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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 411

JAMES S. O'CONNELL
And
FRANCIS L. HARNEY, JR.,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

C. KEEFE HURLEY
60 State Street
Boston 9, Massachusetts
Attorney for petitioner
James S. O'Connell

EARLE C. COOLEY
60 State Street
Boston 9, Massachusetts
Of Counsel for petitioner
James S. O'Connell

STANLEY H. RUDMAN
11 Beacon Street
Boston 8, Massachusetts
Attorney for petitioner
Francis L. Harney, Jr.

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UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, James S. O'Connell and Francis L. Harney, Jr., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the cases of *James S. O'Connell* v. *United States of America* and *Francis L. Harney, Jr.* v. *United States of America* on July 18, 1962.

Opinions Below

There was no formal opinion of the United States District Court for the District of Massachusetts.

The opinion of the United States Court of Appeals for the First Circuit has not yet been reported. It is printed as Appendix A to this petition, at pages 1a through 21a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 18, 1962. A timely petition for rehearing filed on August 2, 1962 was denied on August 7, 1962 without opinion. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Did the acts charged against petitioners constitute a crime against the United States?

   a. Was the role of the Federal Government under the Federal Aid Highway Act such that petitioners' convictions for conspiracy to obstruct a lawful function of the United States can rest solely upon an alleged conspiracy to prevent the Commonwealth of Massachusetts from receiving a fair valuation and negotiation of damages resulting from its taking of certain real estate for a link in an Interstate Highway?

   b. Can a criminal conspiracy be made out in the absence of any allegation or proof that petitioners conspired to cause the Commonwealth of Massachusetts to pay more than fair market value for the real estate in question?

2. Should the District Court have ordered production by the Government under the Jencks Act, Title 18 U.S.C. § 3500, of a report of a Congressional Subcommittee known as the "Blatnik Committee?"

3. Was testimony concerning the destruction of records by three other alleged conspirators long after termination of the alleged conspiracy properly admitted against petitioners, who were not present and had nothing to do with that event?

4. Was it prejudicial error for the District Court to admit and then refuse to strike testimony of an alleged expert who did not testify as such, but whose testimony consisted of:

a. A statement of the contents of a public document on file with the Registry of Deeds, and

b. A "critique" of documents already before the jury as exhibits?

5. Were petitioners deprived of a fair trial by intense adverse publicity?

6. Was the evidence sufficient to support the charge that petitioners participated in a conspiracy to defraud the United States?

Constitutional Provisions, Statutes, Rules and Regulation Involved

The Constitutional provision involved is the Sixth Amendment, providing in material part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .; to be confronted with the witnesses against him . . ."

The following statutes are involved and are printed as part of Appendix B to this petition:

18 U.S.C., Section 371, under which petitioners were indicted and tried.

18 U.S.C., Section 3500, the Jencks Act.

23 U.S.C., Sections 101, 105, 106, 108, 109 and 110(a), constituting pertinent provisions of the Federal Aid Highway Act.

Massachusetts General Laws, Chapter 79, Section 12, setting the measure of damages for real estate taken by the Commonwealth of Massachusetts under the power of eminent domain.

The following Federal Regulations in effect under the Federal Aid Highway Act prior to May 11, 1960 are involved and are printed as part of Appendix B to this petition:

23 C.F.R., Chapter 1, Section 1.8, setting forth certain surveys, plans, specifications and estimates required from a State by the Secretary of Commerce.

23 C.F.R., Chapter 1, Section 1.9, requiring execution of a project agreement before Federal Highway aid could be paid to a State.

Rule 27 of the Federal Rules of Criminal Procedure is involved, and this Rule provides as follows:

> "An official record or entry therein or the lack of such a record may be proved in the same manner as in civil actions."

Statement of the Case

On August 18, 1961, the grand jury returned against petitioners an indictment purporting to charge them with conspiracy to defraud the United States and an agency thereof, namely, the Bureau of Public Roads, in violation of 18 U.S.C. 371. (R. 1, 12-13) Petitioners were arraigned on August 22, 1961 and pleaded not guilty. (R. 1) The

District Court judge in all proceedings was Sweeney, Ch. J. (R. 1-7)

The indictment purported to charge petitioners with conspiring to defraud the United States and an agency thereof in violation of 18 U.S.C. 371 (R. 12-13) The indictment does not allege any loss of money or property by the United States as a result of the alleged conspiracy, but relies solely on the allegations that petitioners conspired:

> "(a) to hamper, hinder, obstruct, and impede the lawful functions, operations and purposes of said Bureau of Public Roads of the Department of Commerce in the administration of the Federal Aid Highway program by impeding and preventing by craft, trickery and deceit a fair, honest, and disinterested valuation and negotiation of damages resulting from the taking by the Commonwealth of the real property owned by Damort Land Corporation.
>
> (b) to divert or cause to be diverted to the personal use, gain and benefit of one or more of the defendants and co-conspirators a large portion of the money paid by the Commonwealth to Damort Land Corporation in payment for the real estate taken from said corporation, the share of said payment reimbursable by said agency of the United States being ninety per cent, contrary to and in derogation of the purpose and intent of the Commonwealth in making the said payment and contrary to and in derogation of the purposes and intent of the Federal Aid Highway program and
>
> (c) to cause the Commonwealth to pay to Damort Land Corporation in payment for the real estate taken from said corporation an amount of money far in excess of the sum which the said owner demanded and was willing to receive in full payment of its claim." (R. 12-13)

Each petitioner filed a motion to dismiss the indictment (R. 1, 16-17) as well as a motion to strike and a motion for particulars. (R. 1, 17-19, 20-29) These motions were heard and denied by the District Court on September 18, 1961. (R. 1)

Trial commenced on October 24, 1961 with the Government's opening statement of the evidence which would be introduced in support of the indictment. (R. 82-86) On the basis of such statement, each petitioner filed motions to dismiss the indictment and for acquittal. (R. 3, 55) These motions were argued by counsel and denied by the District Court. (R. 3, 129)

During the course of arguments on the motions filed at the close of the Government's opening, counsel for petitioner O'Connell alluded to a subpoena issued by the Government, and pointed out that it commanded the Massachusetts Department of Public Works to produce a project agreement with the United States signed September 29, 1961 (R. 87-89), which was more than one month after the indictment was returned (R. 1) and eleven days after the hearing on petitioners' original motions to dismiss the indictment.

Counsel for the Government admitted that the project agreement was signed on September 29, 1961 (R. 89-90); but took the position that the existence of such an agreement during the period covered by the indictment was not essential to the Government's case. (R. 89-90) Counsel for the Government stated the theory of the prosecution to be that "persons conspiring to defraud, knowing of federal aid forthcoming but not yet paid, can be adjudged guilty of conspiracy to defraud the United States." (R. 91)

Counsel for the Government further maintained that at a certain stage of the Federal aid program, within the period covered by the indictment, there was "a definite contractual obligation which occurred between the Bureau

of Public Roads and the Department of Public Works." (R. 91) He declined to state that the alleged "contractual obligation" was a commitment of the United States to pay for land acquisitions (R. 91-92), but referred to it as causing a reservation of funds in an "obligated stage" within the Bureau of Public Roads, after which the State was free to request execution of a project agreement and subsequent payment. (R. 92-93)

The Government proceeded with its case against the petitioners on October 25, 26, 27 and 31, 1961.

The jurisdictional basis of the Government's case; i.e., the establishment of a federal function, rested upon a series of four letters between the Massachusetts Department of Public Works and the Bureau of Public Roads. (R. 102-104, 291-298), and upon a resulting "reservation of funds" on the books of the latter agency. (R. 102-104, 108, 295-298) It is petitioners' position that such correspondence and "reservation" did not create any obligation on the part of the United States to partially reimburse the Commonwealth for the land taking in question and hence did not give rise to a federal function which could be obstructed by the alleged conspiracy.

There was no allegation and no evidence that petitioners conspired to cause the Commonwealth of Massachusetts to pay more than fair market value for the real estate in question, or that the Commonwealth in fact paid more than the property was worth. Indeed, the Government's evidence comes down merely to a charge that petitioner's conspired to cause the Commonwealth to pay more for the property than the land owner had been willing to take before consulting a lawyer. (Appendix A, infra p. 13a).

Walter M. Webb was the president, treasurer and sole stockholder of Damort Land Corporation, which owned the real estate in question. (Appendix A, infra p. 6a) He was the Government's principal witness. (R. 170-234) During

the cross-examination of Webb it was brought out that he had been interviewed by representatives of a Congressional Subcommittee known as the Blatnik Committee on six or eight occasions. (R. 195-196) The first three interviews occurred during a four to six week period in the early part of 1961. (R. 196) As Webb talked to the Blatnik Committee representatives on the first occasion, they took notes. (R. 196) At the second meeting, quotations of Webb's statements at the first interview were read to him and he agreed that such quotaions were correct. (R. 196) Webb testified that his statements to Blatnik Committee representatives were substantially the same as those he gave to the F. B. I. (R. 223)

Upon motion of the petitioners for production of all of Webb's statements in the possession of the United States (R. 3, 561), the District Court ruled that the petitioners were not entitled, under 18 U.S.C. 3500, to examine and use the Blatnik Committee report marked Exhibit 32 for identification. (R. 3) The Court further refused to order the appearance of the author of said report and hold a hearing to determine whether it was a "statement" under and otherwise within the contemplation of 18 U.S.C 3500. (R. 3, 200) After the report was marked for identification, it was impounded in both the District Court and the Court of Appeals, and counsel for the petitioners have never had an opportunity to examine it.

It is indisputable that the alleged conspiracy would necessarily have terminated on April 8, 1960, the date on which the land owner received the net proceeds of the settlement with the Commonwealth from petitioner O'Connell. Consequently, petitioners took the position that any act or statement of any alleged co-conspirator subsequent to April 8, 1960 could not have been in furtherance of the alleged conspiracy.

The District Court received *de bene* testimony of alleged

co-conspirator Felix J. Myette concerning a destruction of records by Myette, alleged co-conspirator Webb, and defendant Lawton. This evidence was received despite the fact that Myette clearly placed such event subsequent to April 8, 1960. (R. 152) The District Court received similar testimony on the same basis from Webb. (R. 190-191) Webb placed the destruction of records in August of 1960 (R. 190), long after the termination of the alleged conspiracy. The testimony of Myette and Webb concerning this event was not limited to the revelation merely of an act, but included testimony of the circumstances surrounding the destruction of records and the conversations of Myette, Webb and Lawton in connection therewith. (R. 152-156, 190-191)

Petitioners had established early in the trial their objections to the reception of acts and declarations of alleged co-conspirators done or said in the absence of the petitioners. (R. 137-138, 146, 148, 150, 169, 172-174) The District Court set the procedure of receiving such evidence *de bene*, subject to the establishment of a conspiracy. (R. 139-140, 173-174) At the close of the Government's case, each petitioner moved that the evidence received *de bene* against him be stricken. (R. 271) These motions were denied. (R. 271)

Oscar H. Beasley, a real estate appraiser employed by the Bureau of Public Roads, was called as a witness by the Government. (R. 253) Beasley was not offered to state his opinion of the value of the real estate in question, but to "critique" the appraisals of alleged co-conspirators Hopkins, Collins and Schwartz, which appraisals already were before the jury as exhibits. (R. 251-252, 367, 371, 411)

Beasley gave a long list of his qualifications (R. 253-254) and then proceeded to his "critique." He pointed out an error in Collins' arithmetic, but his own attempts to correct the error produced an erroneous result. (R. 263-264,

268-269) He stated that the Collins and Schwartz appraisals contained an identical error with respect to the grantor and the area of a parcel of land in Attleborough, Massachusetts, which both had listed in their appraisal reports as a sale of land comparable to the land in question. (R. 264-265) This alleged error was established by Beasley's oral testimony as to what he had seen in the Registry of Deeds upon examination of a public record. (R. 264-265) The record or a copy was not produced.

All of the above testimony of Beasley was received over petitioner's objections and subject to the District Court's ruling that, "I will allow it and save your objections to all of this line of inquiry." (R. 264)

Prior to cross-examining, counsel for petitioner O'Connell moved to strike Beasley's testimony, but the District Court let it stand "for what it is worth." (R. 265)

The worth which the jury attached to Beasley is established by the fact that they retired to deliberate following the charge (R. 276-289), but returned in a short period of time with a request for the transcript of Beasley's testimony. (R. 289) The District Court refused to deliver the transcript to the jury, but read the entire direct testimony of Beasley and part of his cross-examination. (R. 289-290) The jury again retired and returned at 3:25 P.M. with verdicts of guilty. (R. 290)

On the question of whether the evidence was sufficient to establish the participation of each petitioner in a conspiracy, the Court of Appeals has stated the Government's evidence at great length. (Appendix A, infra pp. 6a-12a) Petitioners adopt this statement in all but two particulars.

The first relates to a telephone call received by Webb from alleged co-conspirator Hopkins. (Appendix A, infra p. 9a) Hopkins, a right of way negotiator for the Massachusetts Department of Public Works assigned to appraise the property in question, called Webb in mid-November,

1959 to ask for the keys to the property and to make some inquiries about the land. (R. 169-170, 178-179). Webb answered some of Hopkins questions (R. 170), but for a general discussion of the property, referred him to his attorney. (R. 179)

The second area of difference relates to Webb's visit to O'Connell's office on April 4, 1960. (Appendix A, infra p. 11a) As a result of being notified by O'Connell that the Commonwealth of Massachusetts had paid for the real estate, Webb went to O'Connell's office on April 4, 1960. (R. 182) Harney was present, but there was no evidence that Webb had an appointment to meet Harney there, as stated by the Court of Appeals.

At the April 4 meeting Webb asked O'Connell and Harney "how the price received for the Damort land property could be arranged." (R. 181) According to Webb, Harney said that "three appraisals were gotten that were around $67,000, $64,000 and $57,000," that a fourth appraisal was needed and that Lawton appraised the property. (R. 181) Webb asked what would happen if anyone asked him any questions and was advised that "the price was worth $60,000." (R. 181) According to Webb, O'Connell said, "We should have met prior to this, we should have known each other before this" and suggested it would not be wise to mention Harney's presence in O'Connell's office. (R. 184) In all other respects, petitioners accept the Court of Appeals' description of the events of April 4, 1960.

Beginning in or about August of 1960 and continuing to the present time a Subcommittee of the Public Works Committee, United States House of Representatives (The Blatnik Committee), and the Bureau of Public Roads have been engaged in investigatory activities in the Commonwealth of Massachusetts and elsewhere, in connection with which there has been an abundance of publicity in the various media of communication describing alleged scandals invol-

ved in the administration of the Federal Aid Highway Program. (R. 33, 39, 47 and see Appendix A, infra p. 16a) This publicity has been intense throughout the pendency of this case.

In addition to the publicity caused by the activities of the Blatnik Committee and the Bureau of Public Roads, there were various investigations carried on in Massachusetts, especially in Boston, at or about the time of trial, dealing with alleged irregular and improper activities of officials of the Department of Public Works. (R. 33-34, 40, 47) Furthermore, there were, at the same time, hearings before the Finance Commission of the City of Boston relating to alleged "mystery land" acquisitions by city agents or employees through the medium of a straw. (R. 34, 40, 47, 433-435 and see exhibits to affidavits of C. Keefe Hurley)

The public impression of wide-spread corruption in the Commonwealth of Massachusetts was further cemented at the time of trial by an article entitled "Poisoned Politics" appearing at pages 77-81 of the October, 1961 edition of the "Atlantic Monthly," which article was authored by Elliot L. Richardson, former United States Attorney, who was in charge of and participated in presentation of these cases to the grand jury. (R. 34, 40-41, 47-48 and see exhibits to affidavit of C. Keefe Hurley filed October 19, 1961)

Against this background, counsel for the Government filed a motion on October 17, 1961, seven days before commencement of the trial, requesting the issuance of a subpoena to the Department of Public Works and setting forth the alleged belief of the Assistant United States Attorney that certain documentary evidence was missing from the files of the Department of Public Works. (R. 2, 29-32) This motion was allowed on the same day. (R. 2)

Commencing on October 17, 1961, there was an avalanche of newspapers and radio publicity in Massachusetts as a

result of the filing and allowance of the Government's motion. (R. 34, 41, 48-49 and see exhibits to affidavit of C. Keefe Hurley filed October 19, 1961.) This publicity created the unavoidable impression in the minds of the public and prospective jurors that the petitioners were in some way connected with an attempt to conceal evidence from the Government and the Court. Neither of the petitioners had access to the files of the Department of Public Works. (R. 35, 42, 49)

Further publicity creating an impression of wholesale corruption in Massachusetts continued throughout the trial (R. 433-435 and see exhibits to affidavit of C. Keefe Hurley filed November 11, 1961), and at one point the radio and press published false reports that testimony had been received in these cases concerning matters which the District Court had stricken from the indictment. (R. 193-194, 277-278)

Reasons for Granting the Writ

1. A vital question of federal jurisdiction is involved in this case.

Although petitioners were convicted of conspiring to defraud the United States in violation of 18 U.S.C. 371, the jurisdictional basis of the Government's case must stand or fall on the interpretation of the Federal Aid Highway Act, 23 U.S.C. 101 et seq.

This is a case of first impression, for the scope of the Federal Government's function and power under the Federal Aid Highway Act has never been the subject of judicial consideration. That question is now squarely presented by the charge that petitioners conspired to wrongfully interfere with the Government's functions under the Act. (R. 12-13)

The rights of the petitioners are tightly entwined with

problems of conflicting sovereignty, for there are involved herein extremely serious legal questions concerning the reach of federal power in the matter of federal aid to the States. These questions are fraught with current legal, political and economic considerations involved not only in the administration of the Highway Act, but also in proposals for federal aid to the States in areas of health, education and welfare.

Moreover, the Blatnik Committee has investigated the administration of the Highway Act in Massachusetts, Oklahoma, Florida and elsewhere. The United States Department of Justice has likewise probed this area. As a result of these investigations numerous indictments have been returned throughout the United States and at the present time there are no less than ten defendants in the District of Massachusetts alone who have not yet been tried under indictments similar to the one in this case. The rights of these defendants, as well as of petitioners, are compelling reasons for the granting of certiorari.

Do workmen who become intoxicated on their lunch hour, knowing that their work on a federally aided highway will be sub-standard in the afternoon, interfere with a federal function because their condition slows down construction? If a group of Mr. Webb's neighbors, pursuant to an agreement between themselves and without any contact with the Commonwealth, persuaded him not to accept $30,000 for the Damort property, but to hold out for $60,000, would they be guilty of a crime against the United States? Would violations of a State criminal statute by teachers in federally aided schools interfere with a federal function? If two people deceive neighbors or friends or business associates concerning their citizenship, or their income, or any of the innumerable facts of life which are now regulated and investigated by some department or agency of the United States, have they conspired to obstruct the federal regula-

tory or investigative function? Does the prospect of federal aid require a surrender to federal jurisdiction and control, or is the United States limited to the sanction of withholding its money from States which do not comply with certain set standards?

These and other problems are inherent in this case and further emphasize the necessity for review by this Court.

In order to constitute a crime against the United States, the acts alleged as a violation of 18 U.S.C. Section 371, must have either a purpose to defraud the Government of some property right or pecuniary interest, or a purpose to obstruct or defeat some lawful function of the Government or agency thereof. *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924); *United States* v. *Kaiser*, 179 F. Supp. 545, 547 (D.C. Ill. 1960)

The Government did not allege or attempt to prove that petitioners conspired to defraud the United States of some property right or pecuniary interest. Consequently, the jurisdictional basis of the Government's case depends upon whether or not the allegations and proof set forth a conspiracy to obstruct or defeat some lawful function of the Bureau of Public Roads. It is petitioners' contention that even under the broadest and most liberal interpretation of the Federal Aid Highway Act, the United States should not be permitted to obtain convictions where not a single alleged deception or act was practiced upon or directed against the Federal Government or any agency thereof. To permit such a result is to transform the concept of federal aid to State initiated programs into the opposite philosophy of complete federal domination and control.

The Federal Aid Highway Program is not a nationalized program performed by the Federal Government such as those involved in *Green* v. *United States*, 28 F.2d 965 (C.A. 8, 1928); *Langer* v. *United States*, 76 F.2d 817 (C.A. 8, 1935); *Curley* v. *United States*, 130 Fed. 1 (C.A. 1, 1904)

and *United States* v. *Weinberg*, 226 F.2d 161 (C.A. 3, 1955), cert. denied, 350 U.S. 933 (1956). It is a State program, federally aided. The differences between the two undertakings are fundamental to maintaining the sovereign existence of the States as separate governmental and political entities. Accordingly, the United States should not be permitted to exercise criminal jurisdiction in matters of State concern.

The Government maintains that within the period covered by the indictment, it became obligated to reimburse the Commonwealth of Massachusetts for the Damort taking and that, therefore, the acts charged against petitioners obstructed its reimbursement function. (R. 91-92)

Petitioners submit that even if such an obligation existed, it should not permit the United States to prosecute for alleged acts directed wholly against a State. Furthermore, it is clear that no obligation of federal reimbursement ever arose under the Highway Act.

The only portions of the Act which make reference to a contractual relationship between the Federal Government and a State are Sections 106, 108 and 110(a).

Section 110(a) requires a project agreement between the Federal Government and the State covering construction and maintenance of the project "as soon as practicable after the plans, specifications and estimates for a specific project have been approved." The Government concedes that there was no project agreement within the period covered by the indictment. (R. 89-90)

Section 108 refers to an agreement between the Secretary and the State with respect to advance acquisitions of rights-of-way, which is exactly what is involved in this case. However, counsel for the Government conceded that there was never an agreement under this Section. (R. 94) In fact, he stated that Section 108 does not apply to Massachusetts at all. (R. 94)

The obligation of reimbursement relied upon by the Government to establish its function in this matter must have arisen under 23 U.S.C., Section 106, or not at all. That Section provides that such an obligation comes into being upon project approval by the Secretary of Commerce. The Government clearly relies on this Section. (R. 131-132). A PROJECT is an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway constructed. 23 U.S.C., Section 101. Under the definition of CONSTRUCTION, 23, U.S.C., Section 101, an "undertaking to construct" means more than the mere acquisition of rights of way.

It is clear that neither the letters between the Commonwealth and the Bureau of Public Roads (R. 102-104, 291-298) nor the "reservation of funds" on the books of the Bureau (R. 102-104, 108, 295-298) establish that the Secretary of Commerce or a duly authorized representative approved a project, i.e., an undertaking to construct a Massachusetts link of Interstate Roate 95. Indeed, the indictment alleges the approval of merely *a portion* of a project (R. 8, 9) and the above-mentioned correspondence shows that nothing more than a portion of a project was ever submitted and approved. Only approval of an entire project gives rise to a federal reimbursement obligation under Section 106.

Furthermore, project approval is accomplished only through approval of plans, specifications and estimates submitted to the Secretary of Commerce by the State, 23 U.S.C., Sections 106, 109; 23 C.F.R., Chapter 1, Section 1.8. There is nothing in the indictment or evidence which even suggests that the plans, specifications and estimates required by the above statutes and regulations were ever submitted by the Commonwealth of Massachusetts during the period covered by the indictment. In fact, there is strong

record support that they were not submitted until September 18, 1961. (R. 105)

It is thus apparent that the purpose of the correspondence between the Bureau of Public Roads and the Department of Public Works was not to create an obligation under Section 106. The real purpose was to lay the groundwork for inclusion of the right-of-way items in a project agreement under Section 110(a), if and when one ever was executed. Unless such groundwork was laid, the items could not be included in such agreement. 23 C.F.R., Chapter 1, Section 1.9. But a project agreement was the *sine qua non* of a federal obligation, and no such agreement ever existed during the period covered by the indictment. It follows that there was no federal function which petitioners could have conspired to obstruct.

2. The holding of the Court of Appeals that the fair market value of the real estate was an irrelevant consideration renders conspiracy to defraud the United States a boundless offense and places in jeopardy every lawyer undertaking to represent a client whose land has been taken by a State for use in an Interstate Highway.

The Court of Appeals recognized the clear duty of the United States to pay fair value for any land it takes for public purposes. (Appendix A, infra, p. 13a) Although the United States did not take the real estate in question, it is clear that the same duty is imposed upon the Commonwealth of Massachusetts.

In the first instance, the measure of damages for real estate taken by the Commonwealth under the power of eminent domain is the fair market value of the land before the taking. Massachusetts General Laws, Chapter 79, Section 12; *Nichols* v. *Commonwealth*, 331 Mass. 581, 584 (1954)

Since the Commonwealth has the duty to pay fair market value for land which it takes, no agreement or concert of

action between two or more persons to obtain from the Commonwealth a price which does not exceed such value can be either a State crime or a Federal offense. Furthermore, so long as the Commonwealth pays fair value for land which it takes, the uses made or to be made of the proceeds and the amount which the owner may at some point in time have been willing to accept are of no concern to either the Commonwealth or any agency of the United States. *Tufts* v. *Charlestown*, 4 Gray 537, 539 (Mass. 1855); *Goodyear Park Co.* v. *Holyoke*, 298 Mass. 510 (1937). The contrary holding by the Court of Appeals now exposes to criminal liability every lawyer who does not undertake to settle a similar land taking case for the lowest price which his client is willing to accept. This follows without regard to whether the client is correct in his evaluation. If this decision is permitted to stand, no lawyer can safely negotiate for any settlement which exceeds his client's most modest expectations. Indeed, it would be unlawful for friends and neighbors of a landowner to advise him to hold out for a price in excess of the minimum return which he is willing to receive.

There is not the slightest indication in the record that the landowner in this case wanted to give his land away or that he was desirous of giving the Commonwealth the most advantageous possible bargain. By predicating its holding upon these considerations, the Court of Appeals has enunciated a doctrine which this Court should review in order to determine whether the arm of federal criminal jurisdiction has been extended to areas of everyday life never intended to be within its purview.

3. This case presents a question of vital importance under the Jencks Act, 18 U.S.C., Section 3500.

Both of the Courts below have upheld the Government's contention that the Blatnik Committee Report marked exhibit 32 for identification is not a "statement" of the

witness Webb within the meaning of the Jencks Act, 18 U.S.C., Section 3500(e)(1) and (2).

It is immaterial that the report contained matters attributable to persons other than Webb. Petitioners' motion only requested "statements" of Webb in the possession of the United States. (R. 56) If the report contained such a "statement" it should have been delivered to the defense upon deletion of any extraneous matter. See 18 U.S.C., Section 3500(c).

Petitioners submit that the question of whether the Blatnik Committee Report was or contained a "statement" of Webb should not have been resolved merely upon an examination of the document. It was clearly established that Blatnik Committee representatives wrote down what Webb had to say, later read it back to him, and obtained his approval of its accuracy. (R. 195-196) It is submitted that this constituted a *prima facie* showing of entitlement to the report that required the trial judge to take extrinsic testimony and evidence out of the presence of the jury to assist him in reaching his determination whether to order production of the document. *Campbell v. United States*, 365 U.S. 85 (1961) This the trial judge refused to do. (R. 200) In upholding the District Court, the Court of Appeals has placed upon the defense the burden of proving every single element necessary to establish that a document is a "statement." This ruling is contrary to the *Campbell* case, supra, which places the burden on the Government to substantiate its claim that a document is not a "statement" within the meaning of the Jencks Act.

Webb's testimony clearly established that at some point representatives of the Blatnik Committee possessed "statements" of his under the Jencks Act. Consequently, there arises the additional question of whether the Government should be permitted to continue to evade the purpose and intent of the Jencks Act by destroying "statements" of

witnesses and incorporating them as purported summaries of evidence in unsigned documents.

4. The holding of the Court of Appeals misapplies this Court's ruling in *Lutwak* v. *United States*, 344 U.S. 604 (1953) so as to destroy the doctrine of *Krulewitch* v. *United States*, 336 U.S. 440 (1949).

The *Krulewitch* case held that declarations of a conspirator are inadmissible against and do not bind an alleged co-conspirator if made after the conspiracy has ended.

In *Lutwak* this Court held that acts of a conspirator after the conspiracy had ended were admissible against alleged co-conspirators because the acts in and of themselves were relevant to prove the spuriousness of certain foreign marriages which were the subject of the conspiracy. Indeed, the acts in question were almost conclusive evidence that the marriages were a sham.

In the case at bar the destruction of records by defendant Lawton and co-conspirators Myette and Webb long after the end of the alleged conspiracy was not an act which in and of itself was relevant to prove a conspiracy. On the contrary, this act was absolutely meaningless until the hearsay declarations of the alleged co-conspirators were admitted to explain it. (R. 152-156, 190-191)

For example, if an F.B.I. agent had looked through a closed window at the scene, he would have observed Lawton, Webb and Myette tearing up papers. He would have had no way of knowing what was in the papers or what their purpose was. The act would be inadmissible. Only by opening the window and hearing the conversations of the alleged co-conspirators could the F.B.I. man assign meaning to the act. But such declarations are inadmissible under *Krulewitch*.

Placing the jury in the same posture as the F.B.I. man, it is clear that neither the act of destruction nor the surrounding declarations should have been admitted against

petitioners who were not present and who had no knowledge of or contact with this meeting.

Neither should such evidence have been taken *de bene* against petitioners since it could never had been tied to the alleged conspiracy, the acts and declarations having occurred long after termination of the offense charged.

Petitioners' objection to this evidence (R. 153) was to no avail. Neither were their motions to strike (R. 271) nor their request for a limiting instruction (R. 273-274) allowed.

This is not a case where the record fairly shrieks the guilt of the parties, as in *Lutwak* v. *United States*, 344 U.S. at 619. On the contrary, it cannot be said that the erroneous admission of this evidence may not have been the weight that tipped the scales against petitioners. *Krulewitch* v. *United States*, 336 U.S. at 445.

The *Krulewitch* case was a studied attempt by this Court to place proper limits on the wide latitude afforded the prosecution in conspiracy cases. *Lutwak* was not intended to destroy those limitations. It is submitted that the Court of Appeals has reached a contrary result and that certiorari should be granted to permit this Court to review the effects of that holding.

5. By allowing the admitted errors in connection with the testimony of Oscar H. Beasley to stand, the decision of the Court of Appeals further relaxes the already minimal protection afforded defendants in a conspiracy case.

Beasley's "critique" of exhibits which were already in evidence clearly constituted an usurpation of the jury's function of weighing the evidence. Expertise is not the medium of injecting into the record material and information not within the scope of an expert's qualifications and otherwise inadmissible from him. *United States* v. *Ward*, 169 F.2d 460 (C.A. 3, 1948).

Beasley's comparison of exhibits was a question of ob-

servation not calling for the testimony of an expert. *Padgett* v. *Buxton-Smith Mercantile Company*, 262 F.2d 39, 41-42 (C.A. 10, 1958); *Walton* v. *Sherwin-Williams Co.*, 191 F.2d 277, 284-285 (C.A. 8, 1951); See: *Swink* v. *Colcord*, 239 F.2d 518 (C.A. 10, 1956).

Beasley's testimony concerning comparable sales was likewise incompetent. (R. 260-263) "Opinion evidence, to be of any value, should be based upon admitted facts, or upon facts, within the knowledge of the witness, disclosed in the record. Opinion evidence that does not appear to be based upon declared facts is of little or no value." *Balaban & Katz Corp.* v. *C.I.R.*, 30 F.2d 807, 808 (C.A. 7, 1929); *Giant Food Stores, Inc.* v. *Fine*, 269 F.2d 542 (D.C.C.A., 1959).

The Court of Appeals recognized that Beasley's oral testimony as to what he had seen in the records in the Registry of Deeds violated the "best evidence" or the "original document rule". (Appendix A, infra p. 19a) Rule 27, Federal Rules of Criminal Procedure; *Allen* v. *W. H. O. Alfalfa Milling Co.*, 272 F.2d 98 (C.A. 10, 1959); *Howe* v. *Town of Ware*, 330 Mass. 487, 115 N.E. 2d 155 (1953). The Court held, however, that petitioner's general objection to this evidence was insufficient to avail them of this obvious error. In making this ruling the Court relied upon Rule 51 of the Federal Rules of Criminal Procedure, set forth in Appendix A, infra p. 20a. It is submitted that Rule 51 does not require the ground of an objection to be stated when such ground is obvious. *Noonan* v. *Caledonia Mining Co.*, 121 U.S. 393, 400 (1882); See: McCormack Evidence 118 (1954).

It is petitioners' position that the ground of the objection to oral testimony concerning the contents of a public record was readily apparent to the trial judge and that he fully intended to save petitioners' rights with respect to this evidence. (R. 264, 265)

The inference is inescapable that Beasley's testimony was injected into the trial solely for the atmosphere it could generate—solely to impress the jurors with the gravity of a situation, and its nation-wide significance, which had required the Bureau of Public Roads to send experts from Washington to investigate conditions in Massachusetts. It is dramatically evident that his testimony was extremely prejudicial. That the jury gave it great weight may be inferred from the fact that they returned to the courtroom specifically for the purpose of rehearing his testimony. (R. 289-290) Petitioners concede that reversals should not be based on trivial, theoretical and harmless matters. But it cannot be said that these errors were unlikely to have influenced the jury's verdict, especially since Beasley's testimony concerning the Registry records was permitted to stand as the only impeachment of the appraisals of two alleged co-conspirators. *Gordon* v. *United States*, 344 U.S. 414, 422-423 (1953).

6. The holding of the Court of Appeals that extensive adverse publicity did not deprive petitioners of a fair trial nor require the District Court to grant their requested continuance (R. 33-39, 46-54, 193-194, 271) is contrary to the protections afforded by the Sixth Amendment.

The Sixth Amendment gave petitioners the right to a speedy and public trial by an impartial jury. This they did not receive.

It is submitted that the use by the Government of a pre-trial motion based upon the asserted belief that records were missing rather than the employment of the usual subpoena duces tecum to be complied with at the trial without fanfare, leads inescapably to the conclusion that it was the purpose of the Government to try these cases in the newspapers, and on radio and television. This conclusion is fortified by the withdrawal of the motion at the hearing thereon when the Department of Public Works produced

the records, which, it is submitted, would have been delivered to the Government at any time upon a simple request for their production. (R. 2)

The Court of Appeals did not doubt that extensive publicity attended the investigations by the F. B. I. and the Blatnik Committee of alleged scandals attendant upon the taking of lands in Massachusetts. (Appendix A, infra p. 16a) But granting all that petitioners said as to the scope and intensity of the pre-trial publicity, the Court held that the situation fell far short of that which it considered in *Delaney v. United States*, 199 F.2d 107 (C.A. 1, 1952) and *Geagan v. Gavin*, 292 F.2d 244 (C.A. 1, 1961), *cert. denied*, May 28, 1962.

It is submitted that the activities of the United States, through the Blatnik Committee, the Bureau of Public Roads, the present United States Attorney, and the former United States Attorney responsible for presentation of these cases to the grand jury, irrevocably prejudiced the rights of the defendants under the Sixth Amendment to the United States Constitution.

In *Delaney v. United States*, 199 F.2d 107, (C.A. 1, 1952), the First Circuit condemned prejudicial publicity instigated by the United States through its legislative arm, but in this case the legislative and the executive branches have combined to cause or contribute to the causing of an atmosphere of ineradicable prejudice. Having produced this result, it was neither right, nor in harmony with the Sixth Amendment, for the United States to make the petitioners stand trial while the damaging effect of such hostile publicity may reasonably be thought not to have been erased from the public mind.

The Government cannot successfully maintain that the problem was cured by the District Court's screening of jurors or by cautionary instructions to the jury. The naive assumption that prejudicial effects can be overcome by in-

structions to the jury is an unmitigated fiction. *Krulewitch* v. *United States*, 199 F.2d 107, 112 (C.A. 1, 1952)

It is conceded that the trial judge has a wide discretion in this area, and that great weight is accorded any determination of his that extra courtroom publicity is not of a sort likely to prejudice the accused. However, in these cases, the trial judge made no such determination. Rather, he accepted such prejudicial publicity as "one of the fortunes of war." (R. 194)

It is submitted that trial by newspaper cannot be accepted as a necessary by-product of a free press, especially where the publicity is generated through the improper actions of the United States through its executive and legislative branches. See *Delaney* v. *United States*, supra.

Furthermore, although the *Delaney* case recognized the general acceptance of trial by newspaper where the Government is not the efficient cause of the prejudicial publicity and where it is produced through the initiative of the newspapers themselves, the present cases present a situation in which the press and radio carried false information concerning the trial. (R. 193-194, 277-278)

7. The evidence was insufficient to establish the charge that petitioners participated in a conspiracy to defraud the United States.

It was necessary for the Government to establish each petitioners' participation in a conspiracy by evidence of his own acts and deeds, *Glasser* v. *United States*, 315 U.S. 60, 75 (1942); *Ong Way Jong* v. *United States*, 245 F.2d 392 (C.A. 9, 1957), and not by the acts and declartions of alleged co-conspirators. The Government failed to do this.

The most the evidence permits one to say about O'Connell is that he is an attorney who represented Damort Land Corporation in its claim against the Commonwealth; that he was paid $30,000 of a $60,000 settlement for his services;

that he didn't tell the Commonwealth his client was willing to accept $30,000 for the taking; that he believed the Damort property was worth $60,000; and that Harney was present in his office on four occasions, a fact which O'Connell suggested it would not be wise for Webb to mention.

All that can be said about Harney is that he was employed by the Department of Public Works to do certain preliminary work unrelated to negotiating a settlement of the Damort taking; that he made several statements to Webb which lead to a multitude of inferences, all of which are speculative; that he recommended O'Connell as the attorney to handle the Damort claim; and that he knew O'Connell well enough to be in his office on four occasions.

None of the foregoing is sufficient to warrant the convictions. The presumption of innocence with which an accused stands before the bar of justice is not overcome by circumstantial evidence which offers a reasonable hypothesis other than guilt. *United States* v. *Gasomiser Corp.*, 7 F.R.D. 712, 718 (D.C. Del., 1947); *Crespo* v. *United States*, 151 F.2d 44, 45 (C.A. 1, 1945). The acts and declarations charged against petitioners are, in every instance, at least as consistent with their innocence as with their guilt.

The Government's case was based upon nothing more than the size of O'Connell's fee, Harney's presence in O'Connell's office, and the alleged suggestion that Webb not mention Harney's presence. On the basis of these slender strands, the Government was improperly permitted to use against petitioners the acts and declarations of alleged co-conspirators, and the jury was permitted to convict. If this result is permitted to stand, the crime of conspiracy has truly become a boundless offense, guilt of which can be based upon mere association. See *United States* v. *DiRe*, 332 U.S. 581, 593 (1948); *Ong Way Jong* v. *United States*, 295 F.2d 418 (C.A. 10, 1957).

Conclusion

For the foregoing reasons a Writ of Certiorari should be granted in this case. The decision of the Court of Appeals presents serious and important questions of federal law, the resolution of which is vital to the administration of federal criminal justice.

Respectfully submitted,

C. Keefe Hurley
60 State Street
Boston 9, Massachusetts
Attorney for petitioner
James S. O'Connell

Earle C. Cooley
60 State Street
Boston 9, Massachusetts
Of Counsel for petitioner
James S. O'Connell

Stanley H. Rudman
11 Beacon Street
Boston 8, Massachusetts
Attorney for petitioner
Francis L. Harney, Jr.

Appendix A

United States Court of Appeals
For the First Circuit

No. 5956.

FRANCIS L. HARNEY, JR.,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE;

No. 5957.

CHARLES H. LAWTON, JR.,

DEFENDANT, APPELLANT,

v.

SAME:

No. 5958.

JAMES S. O'CONNELL,

DEFENDANT, APPELLANT,

v.

SAME.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Stanley H. Rudman for appellant in No. 5956.

John M. Russell, with whom *Lawrence R. Cohen* was on brief, for appellant in No. 5957.

C. Keefe Hurley, with whom *Earle C. Cooley* was on brief, for appellant in No. 5958.

Paul A. M. Hunt, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, and *Joseph F. Gargan* and *John J. Curtin, Jr.*, Assistant U. S. Attorneys, were on brief, for appellee.

OPINION OF THE COURT.

July 18, 1962.

WOODBURY, *Chief Judge*, The appellants were indicted by a grand jury in the court below for conspiracy to defraud the United States in violation of Title 18 U.S.C. §371 quoted in the margin.[1] The indictment charged that the appellants with five others, Walter M. Webb, Felix J. Myette, Erroll G. Hopkins, Ernest T. Collins and Joseph L. Schwartz, who were named as conspirators but not as defendants, conspired to defraud the United States, particularly the Bureau of Public Roads of the Department of Commerce. The allegations are that the defendants-appellants, knowing that under the Federal Aid Road Act, 23 U.S.C. §101, *et seq.*, the Commonwealth of Massachusetts would apply for and receive from the United States through the Bureau of Public Roads payments in partial reimbursement for damages paid for lands taken for federal highway purposes ". . . did combine, conspire, confederate, and agree" among themselves and with the co-conspirators named but not charged in the indictment "(a) to hamper, hinder, obstruct, and impede the lawful functions, operations and purposes of said Bureau of Public Roads of the Department of Commerce in the administration of the Federal Aid Highway program by impeding and preventing by craft, trickery and deceit a fair, honest, and disinterested valuation and negotiation of damages resulting from the taking by the Commonwealth of the real property owned by Damon Land Corporation; (b) to divert or cause to be diverted to the personal use, gain and

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[1] "§371. Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

benefit of one or more of the defendants and co-conspirators a large portion of the money paid by the Commonwealth to Damort Land Corporation in payment for the real estate taken from said corporation, the share of said payment reimbursable by said agency of the United States being ninety per cent, contrary to and in derogation of the purpose and intent of the Commonwealth in making the said payment and contrary to and in derogation of the purposes and intent of the Federal Aid Highway program and (c) to cause the Commonwealth to pay to Damort Land Corporation in payment for the real estate taken from said corporation an amount of money far in excess of the sum which the said owner demanded and was willing to receive in full payment of its claim, all in violation of Title 18, United States Code, section 371."

On arraignment the defendants pleaded not guilty and soon thereafter the defendants severally filed motions to dismiss, motions to strike portions of the indictment and motions for a bill of particulars. The motions were denied after hearing, further motions to dismiss or in the alternative to continue the trial grounded upon alleged extensive adverse publicity were also denied, and the defendants were set to the bar to be tried by jury. Motions to dismiss and for judgment of acquittal made at the conclusion of government counsel's opening statement to the jury were denied and motions for judgment of acquittal made at the conclusion of the government's evidence were also denied. Electing to introduce no evidence in their own behalf the defendants moved again for judgements of acquittal, and moved to strike portions of the indictment and all evidence admitted *de bene*. The court allowed the motions to strike as to paragraph 13 of the indictment in sofar as it alleged that the land had been purchased by Damort on February 8, 1956, for $20,000, and as to the second overt act alleged, but otherwise denied the motions

and, denying some of the defendants' requests for instructions, submitted the case to the jury. The jury returned verdicts of guilty as to each defendant and thereafter the court, denying motions in arrest of judgment, motions for judgments of acquittal notwithstanding the verdicts or in the alternative for a new trial, passed the judgments of sentence from which these appeals have been taken.

The appellants charge the court below with numerous errors. Their general attack, however, boils down to six fundamental issues. These are whether the indictment alleges facts constituting an offense against the United States, whether the evidence introduced by the government supports the charges laid in the indictment, whether prejudicial pre-trial publicity deprived the appellants of a fair trial, whether the court erred in refusing to direct production by the government under the Jencks Act, Title 18 U.S.C. §3500, of a report of a subcommittee of the Public Works Committee of the United States House of Representatives known as the "Blatnik Committee," whether the court erred in the admission of certain testimony, particularly that of one Beasley, an expert appraiser called by the government, and whether it was error for the court below to have denied certain requests for instruction.

Our first concern is whether paragraph 16 of the indictment, quoted from at length above, charges an offense against the United States. That paragraph in substance charges the appellants with unlawfully conspiring among themselves and with five others (a) to impede the lawful functions of the federal Bureau of Public Roads by fraudulently preventing a fair and disinterested valuation and negotiation of the damages resulting from the taking of land of the Damort Land Corporation by the Commonwealth of Massachusetts for a link in a Federal Aid High-

way, (b) to divert to private use by the conspirators a portion of the money paid by the Commonwealth to Damort for its land, and (c) to cause the Commonwealth to pay an amount for the land far in excess of what the owner was willing to accept in full payment of its claim.

It is now beyond the shadow of doubt that aiding the states in the construction of interstate highways is a lawful function of the United States government. The question of federal power in this regard was said to be settled beyond question years ago in *California* v. *Central Pacific Railroad Co.*, 127 U.S. 1, 39 (1888). And in the leading case of *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924), Mr. Chief Justice Taft wrote for a unanimous Court:

> "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention."

Under this two-pronged interpretation of the statute paragraph 16 of the indictment to which we have referred certainly alleges an offense under the conspiracy statute, for, as will presently appear in detail in our discussion of the evidence, cheating or overreaching the Commonwealth with respect to the amount it paid for land taken by it for federal highway purposes would in the end expend itself upon the federal government to the extent of 90% under the federal aid road act thereby obstructing one of its lawful functions and if successful subjecting it to pecuniary

loss by causing it to pay more than it needed to for the land. The legal sufficiency of the indictment is so clear as not to require further discussion. See, however, *Green* v. *United States*, 28 F.2d 965 (C.A. 8, 1928); *Langer* v. *United States*, 76 F.2d 817 (C.A. 8, 1935), and *United States* v. *Weinberg*, 226 F.2d 161 (C.A. 3, 1955), *cert. denied*, 350 U.S. 933 (1956), for comparable situations in which indictments under the present conspiracy statute, or its substantially similar predecessor, were sustained. And see also *Curley* v. *United States*, 130 Fed. 1 (C.A. 1, 1904), *cert. denied*, 195 U.S. 628 (1904).

We come now to the question whether the evidence supports the charges laid in the indictment and the jury's verdicts of guilty as to each defendant.

In the light most favorable to the government the evidence can be stated as follows:

Prior to the time with which we are concerned, co-conspirator Walter M. Webb was the president, treasurer and sole stockholder of Damort Land Corporation, which owned an irregularly shaped tract of land consisting of 32,500 square feet with a large frame warehouse, a two story frame building, a spur track and a chain link fence on it in Attleborough, Massachusetts. The land lay unused and Webb had listed it with C. H. Lawton Co., a real estate firm in Pawtucket, Rhode Island, for sale. No buyer had been found, but the frame building had once been leased for a time to a concern in the dairy business.

Early in 1959 co-conspirator Myette, an employee of the Lawton real estate firm, attended a public hearing in Attleborough at which he learned that the Damort, or Webb, land, or a substantial part of it, would be taken by the Commonwealth for the construction of a link of Interstate Route 95, a highway under construction in sections under the Federal-Aid Highways Act, which, when completed, would extend from northern Maine to Miami,

Florida. Myette telephoned this information to Webb and suggested that the latter take the Damort property off the market because in his opinion the Commonwealth would prove to be the best buyer. Webb agreed and removed the property from the market. Later in 1959, probably in May, the defendant Harney, a right of way negotiator employed by the Massachusetts Department of Public Works who had been assigned to do preliminary work with respect to the taking of the Damort property, called Myette on the telephone as a result of which the two met and inspected the property. Harney asked Myette if the property belonged to Damort Land Corporation and if his firm was Damort's agent for the sale of the land. Receiving an affirmative reply to the first question and a reply to the second that the Lawton firm had handled the rental of the property, the two carefully examined the land.

Soon thereafter Harney telephoned Myette again and asked the latter to visit the property with him a second time. They met again on the property, this time with the defendant Lawton also, and on that occasion Harney said that the Commonwealth was going to take the land, and "In cases like this oftentimes it is better if the owner had some representation in Boston." Myette said he thought that "was probably the thing to do" and Harney recommended the defendant O'Connell as "a man who could help in getting as much money as possible for the land" saying, according to Myette's testimony, that O'Connell was a lawyer in Boston and had, Myette thought Harney said, "a brother in the Governor's office or something like that and he could make the way clear and easy for the sale of the property."

Myette reported this conversation to Webb who asked what Myette thought. Myette told Webb that he thought it was "all right, because it is being done and has been done" and Webb told Myette: "You go ahead; I haven't

got time to bother with it, you go ahead and handle it."

At about this time Harney called Webb on the telephone and asked him what he wanted for the Damort land. Webb replied that he wanted $30,000 and Harney then said: "If I get you $35,000, is that all right?" to which Webb answered: "O.K."

Soon after this conversation Lawton and Myette, pursuant to a telephone appointment, called on O'Connell in his Boston office. When they arrived Harney was there and after passing the time of day Myette asked O'Connell if he would represent Webb with respect to the taking of the Damort land. O'Connell replied that he would if Webb would send him a letter of authorization and Myette and Lawton then left, leaving Harney behind.

Myette gave Webb a report of the meeting over the telephone and on June 15, 1959, Webb by letter authorized the defendant Lawton to represent him in eminent domain proceedings with respect to the Damort land. Lawton then engaged O'Connell as legal counsel to handle the matter with the Massachusetts authorities and O'Connell entered his appearance for Damort with the appropriate Commonwealth officer.

On August 10, 1959, the Commonwealth officially took 29,500 square feet of the land as Parcels 105, 105a and 105b of Layout 4877 for completing a link in Interstate Route 95 by filing an order of taking in the Registry. The legality of the taking procedure is not questioned.

In the meantime Webb had called Myette several times on the telephone to inquire about O'Connell's progress and finally Myette and Lawton went to O'Connell's office by appointment. When they arrived Harney was there and O'Connell told them that he was making progress but these things take time. But he said he thought the matter would soon be concluded. Again Myette and Lawton left, leaving Harney behind.

Early in the fall "a man by the name of Mr. Potter" (not otherwise identified but apparently an employee of the Massachusetts Department of Public Works) appraised the damages to result to Damort from the taking of its land at $35,000, which appraisal was approved by one Thompson, also of the Massachusetts Department of Public Works. Potter's appraisal was described as a "windshield appraisal" meaning by that, we assume, a casual one made without a detailed study of the land or a full analysis of the elements bearing upon its value.

Every two or three weeks during the fall Webb visited O'Connell's office or called him on the telephone to inquire about progress. In mid-November co-conspirator Hopkins, a right of way negotiator for the Department of Public Works assigned to make a second departmental appraisal of the property, called Webb on the telephone to ask for keys and to make some inquiries about the land which Webb answered. Webb reported his call from Hopkins to O'Connell and at a later meeting in O'Connell's office, at which Harney was present, Webb asked about Hopkins and was told that "he was straightened out—taken care of." Hopkins later submitted an appraisal of $54,000 for the land.

In the meantime co-conspirators Collins and Schwartz had been appointed by some Commonwealth official in the Department of Public Works in substitution for two others, it does not appear who made the substitution, to appraise the Damort property as "outside" or "fee" appraisers, that is, appraisers outside the Department called upon for a fee to appraise special parcels taken by the Commonwealth.

Collins submitted an appraisal of $65,000 for the land on December 28, 1959, and on the same date Schwartz submitted an appraisal of $67,000. The Real Estate Review Board of the Department after considering these appraisals

sent the Damort land matter back for another fee appraisal and the defendant Lawton was appointed as a third outside appraiser. He submitted an appraisal of $60,000 for the land in February 1960 and with it a certificate under oath that he had no interest in the land present or prospective and never had had any interest in it.

On the basis of the appraisals of Hopkins, Collins, Schwartz and Lawton the departmental Real Estate Review Board fixed the maximum figure for out-of-court settlement for the Damort land at $60,000 and sent Webb an agreement for settlement at that figure plus $212.03 for taxes. This gave Webb his first knowledge of the price the Commonwealth would pay for the land. Webb signed the agreement for settlement on March 1, 1960. The award of $60,212.03 was apportioned as follows: Damort Land Corporation c/o James S. O'Connell, Esquire, $47,383.37, City of Attleborough for taxes $558.69, and Rhode Island Hospital Trust Co., mortgagee, $12,269.97.

On April 1, 1960, Myette read in a newspaper that the Commonwealth had settled for the Damort property, and called Webb to tell him so. Webb replied that he had not yet received any money to which Myette said he replied: "Well, when you do I'd like to—you know. I'm a little bit short. I'd like to have some money." Myette said that actually Webb "didn't owe us a quarter" because they had not sold the property but that he thought Webb ought to pay something for the advice and service they had rendered. On April 21, 1960, Webb sent C. H. Lawton & Son a check for $1,500 which he said be calculated as 5% commission for the sale of the land at $30,000.[2] Myette and the Lawton Company divided the amount of the check equally between them.

[2] Webb indicated on the stub of the check that it was drawn as 5% commission on $30,000 and C. H. Lawton Co. billed Webb for a $1,500 "commission." This bill was later destroyed and another substituted "for services."

On April 4, 1960, Webb by appointment met with Harney at O'Connell's office. At that time O'Connell had a check from the Commonwealth payable to "Damort Land Corp." dated March 31, 1960, in the amount of $47,383.37, *i.e.* the difference between the gross award of $60,212.03 and the amount, $12,828.66, due the Rhode Island Hospital Trust Co. on its mortgage. Webb endorsed the check and, demanding a receipt, left it with O'Connell. On this occasion Webb asked how the final price had been arranged and Harney told him that three appraisals had been obtained for $67,000, $64,000 and $57,000 and that when a fourth was required Lawton had made one for $60,000. When Webb asked what he should do if any one asked him questions about the land; he was advised to say that it was worth $60,000, that he had met O'Connell prior to the transaction, and that it would not be "wise" to indicate that he had met Harney in O'Connell's office.

A few days later at O'Connell's office Webb was handed a check drawn by O'Connell on his client's account for $17,383.37 [3] payable to Damort Land Corp. as his share of the settlement. Webb photostated the check before he cashed it.

Webb admitted that he had never made any fee arrangement with O'Connell and that he was never billed by O'Connell for a fee. He said that he understood that he was to get what he wanted for the property, that is to say $30,000, and that O'Connell would get any excess over that amount.

During the summer of 1960 agents of the Federal Bureau of Investigation and representatives of the so-called Blatnik Committee of the United States House of Representatives initiated investigations of land takings for federally

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[3] Gross settlement $60,212.03 minus $12,828.66 due on the mortgage less $30,000 remaining in O'Connell's hands. Or, the amount of the Commonwealth's check payable to Damort Land Corporation delivered to O'Connell, $47,383.37, minus $30,000.

aided highways in Massachusetts. These investigations had extensive publicity and included investigations of the taking of the Damort property in the course of which Webb was interviewed several times both by agents of the FBI and by agents of the Blatnik Committee. Evidently these investigations caused the alleged conspirators some concern for in August, or perhaps even a month or two earlier, Myette and Lawton met with Webb at his office in Boston and matching the Webb and Lawton files removed and destroyed all letters or other papers having any reference to a $30,000 valuation of the Damort land including Lawton's bill to Webb for $1,500 "commission."

We have stated the Government's evidence at length, not to weigh its credibility, that is the jury's function, but to demonstrate its legal sufficiency to support the charge laid in the indictment and the verdicts of guilty as charged. But in performing our function we do not necessarily have to look for direct evidence of a conspiracy for; "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), citing and quoting Mr. Justice Sutherland in *United States* v. *Manton*, 107 F.2d 834, 839 (C.A. 2, 1938), *cert. denied*, 309 U.S. 664 (1940).

From the various meetings of the alleged conspirators it can readily be inferred that they were engaged in the formulation and execution of a common purpose or plan of action with respect to the taking of the Damort land. And what that common plan or purpose was is clear enough to warrant the verdicts of the jury. It was to get for Webb what he wanted for the Damort land and to pocket the balance. Whether the $30,000 over and above what Webb wanted for the land remained in O'Connell's hands or was later distributed by him makes no difference. It is enough

that the jury could reasonably find that by means of the plan the Commonwealth was hoodwinked into paying more for the land than the land owner was willing to accept and that the excess found its way, in the first instance at least, into the pocket of one of the conspirators. And as will presently appear, this is enough to sustain the charge of interference with a lawful function of the United States as well as the Commonwealth of Massachusetts.

The appellants, however, contend that the evidence is fatally deficient in two respects. The asserted deficiencies are lack of evidence that the Commonwealth in fact paid more than the fair value of the land and lack of evidence of a sufficient interest of the United States in the taking to warrant indictment and conviction of the appellants for conspiracy to defraud the United States. We reject both contentions.

It is, of course, the constitutional duty of the United States to pay fair value for any land it takes for public purposes. But this does not prevent a land owner from giving his land to the United States in whole or in part. Nor does it prevent the United States from making an advantageous bargain with a land owner provided, of course, that it does so in a fair, honest and above board transaction. The question is not the fair value of the land. It is whether by chicane the Commonwealth was beguiled into paying more for the land than the land owner acting as a free agent fully able to protect himself (from his testimony it would appear that he is an experienced and competent business man who was fully aware of what he was doing) was willing to accept. See *United States* v. *Weinberg*, 226 F.2d 161, 167 (C.A. 3, 1955), *cert. denied*, 350 U.S. 933 (1956). And see also *Green* v. *United States*, 28 F.2d 965 (C.A. 8, 1928).

In answering the appellants' other contention it is not necessary to undertake a detailed analysis of the Federal-

Aid Highways Act, 72 Stat. 885 (1958), Title 23 U.S.C. §101 *et seq.*, as it stood at the time involved and the administrative procedures under it. It will suffice to say that under the Act and the regulations the highway department of any state desiring to avail itself of federal aid for its highways first submits to the Secretary of Commerce a program of projects for which federal funds previously apportioned to the state by the Secretary are desired, and upon program approval, the state as soon as practicable submits for approval by the Secretary "such surveys, plans, specifications, and estimates for each proposed project . . . as the Secretary may require." §106(a). When the Secretary has approved a project as conforming to statutory standards, funds out of those he has previously apportioned to the state are administratively set aside for the project, the state is authorized to proceed with the project and the Secretary's ". . . approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." §106(a).

In the case at bar this stage was reached at least by April or May 1959, for on September 19, 1958, the Bureau of Public Roads reserved $4,000,000 on its books for the link in Interstate Route 95 from the Rhode Island-Massachusetts line to North Attleborough with which we are concerned, on April 10, 1959, the Chief Engineer of the Massachusetts Department of Public Works submitted plans for the acquisition of right of way for the project, referring to a report and certification of a public hearing, and an estimate of right of way costs of $2,610,000 to the Bureau of Public Roads and on May 8, the Division Engineer of the federal Bureau approved the project and authorized the Commonwealth Department "to proceed with the acquisition of right-of-way."

This is by no means a detailed statement of the pro-

cedures under the statute. But it is enough to show the close relationship between the state and federal governments in the construction of federally aided interstate highway systems. And it is also enough to show that by the time with which we are here concerned the project for which the Damort land was acquired was more than a hope. At the time of the taking, indeed for some time before, federal participation in the construction of the Rhode Island-Attleborough link was not a mere vague possibility for some time in the future but an immediate practical reality with federal funds set aside to pay for the right of way required. It is, of course, not necessary to show that federal funds were actually paid to the Commonwealth in 90% reimbursement for its taking of the Damort land. Conspiracy is a crime even though the contemplated offense may never be consumated. It is enough to show a scheme whereby through fraud federal funds in normal course would be diverted from their true and lawful object. That has been shown, for the thrust of the fraudulent scheme alleged and proved to the jury's satisfaction was directed against and would expend itself on the federal fisc. See *McGunnigal* v. *United States*, 151 F.2d 162 (C.A. 1, 1945), *cert. denied*, 326 U.S. 776 (1945).

We come now to the question whether extensive adverse publicity deprived the appellants of a fair trial or at least required the court below in the sound exercise of its discretion to grant a continuance.[4]

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[4] The appellants' contention that the indictment should be dismissed because of hostile publicity was answered by this court in *Delaney* v. *United States*, 199 F.2d 107, 112 (C.A. 1, 1952), wherein we said:

> "Nor could it be said, in this case, if indeed it could be said in any case, as a matter of law, that the prejudicial effect of this publicity was so permanent, and ineradicable by mere lapse of time, that the court should have recognized the impossibility of a fair trial ever being held at any time within the foreseeable future."

No doubt extensive publicity attended the investigations by the FBI and the Blatnik Committee of the scandals attendant upon the taking of lands in Massachusetts for federally aided highway purposes. But granting all the appellants say as to the scope and intensity of the pre-trial publicity, the situation disclosed falls far short of that considered by this court in the *Delaney* case cited in footnote 4 above. Moreover, it even falls short of the publicity we considered in *Geagan* v. *Gavin*, 292 F.2d 244 (C.A. 1, 1961), *cert. denied*, May 28 1962, *rehearing denied*, June 25, 1962, in which we held that in spite of the pre-trial publicity shown, the jurors fully met the constitutional test for impartiality laid down in *Irvin* v. *Dowd*, 366 U.S. 717 (1961). Moreover the publicity alleged in this case is not as violent or vitriolic as that reviewed by the Court in *Beck* v. *Washington*, 369 U.S. 541 (1962).

We shall not undertake to describe the publicity said to have fatally infected the fairness of the trial or at least to have required continuance. It will be enough to say that an examination of the record discloses that in this case as in *Geagan* v. *Gavin* the court below carefully screened each petit juror on *voir dire* for bias and prejudice engendered by the publicity and carefully cautioned the jurors not to read newspaper accounts or listen to radio reports of the trial during its progress. Enough was done to assure a fair trial. For as the late Judge Learned Hand said in *United States* v. *Dennis*, 183 F.2d 201, 226 (C.A. 2, 1950), *affirmed*, 341 U.S. 494 (1951):

> "Certainly we must spare no effort to secure an impartial panel; but those who may have in fact committed a crime cannot secure immunity because it is possible that the jurors who try them may not be exempt from the general feelings prevalent in the society in which they live; we must do the best we can with the means we have."

Now we come to questions of the admission and exclusion of evidence. We shall consider only a few of the many questions in this category which have been raised, rejecting others as too insubstantial to warrant discussion.

The first question for consideration is whether a certain report of the Blatnik Committee is producible under the Jencks Act, 18 U.S.C. §3500.

Webb testified on cross-examination that twice during the fall of 1960 he was interviewed by agents of the FBI and that in the first half of 1961 he was interviewed some six or eight times by representatives of the Blatnik Committee. Counsel for the defendant demanded and were given the reports of the FBI and then they demanded the reports of the Blatnik Committee. In response to this demand counsel for the United States at the bench said that the Blatnik Committee made no such report as that demanded but there was a three page summary. But the government's counsel said that they belived an examination of the document by the court under the Jencks rule would show that it was not the kind of "statement" required to be produced because it was only an unsigned "compilation" of the interviews of witnesses. The report was then handed to and examined by the court which then said to counsel for the defendants: "I will deny your request. You can mark it for identification if you wish, but I will not allow you to see it." The report was then marked as an exhibit for identification and impounded by the court.

An examination of the exhibit clearly shows that it is not a "statement" of the witness, Webb, within the definition of subsection (e) of the Jencks Act. It is only an unsigned summary of the evidence, some of it attributed to Webb, prepared by someone, we know not whom, bearing upon the taking. It is a statement of the facts obviously drawn from a variety of sources roughly comparable to the statement of facts embodied in this opinion.

Moreover, counsel for the defendants did not make out a *prima facie* case of entitlement to the report thereby requiring the court under *Campbell* v. *United States*, 365 U.S. 85 (1961), to hold a preliminary hearing to determine its producibility by showing through Webb that committee representatives had taken down what Webb said by mechanical or equivalent means or that they had written down what he said and he by signature or its equivalent had approved what the investigators wrote down. In short, the report is not producible as a "statement" under the Jencks Act and there is no evidence to warrant a preliminary hearing to determine its producibility.

The third question for consideration in this category can be answered briefly. Evidence of the declarations of one conspirator not made in the presence of all were admitted *de bene* under appropriate instructions that the jury were not to consider such declarations as binding upon a conspirator not present until it was satisfied from other evidence that the conspiracy alleged in fact existed, and that the absent one implicated in the declaration was involved in the conspiracy. This was not error. *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953). Nor was there error in admitting evidence of the *act* of destroying Lawton's original bill to Webb for "commission" and the substitution of a bill for services even though the *act* took place after the conspiracy alleged had terminated. *Lutwak* v. *United States*, supra at 617, 618. The same is true with respect to the evidence of the destruction of correspondence reflecting a valuation of $30,000.

The only remaining question in this group which we shall consider is the admissibility of a portion of the testimony of the government's expert appraiser, one Beasley. He testified over general objection that the Collins and Schwartz appraisals contained an identical error with respect to the grantor and the area of a parcel of land in

Attleborough which both had listed in their appraisal reports as a sale of land comparable to that taken from Damort. The reports of both appraisers listed as comparable a sale by Whitman's Diner, Incorporated, to Almac's Incorporated, of 48,224 square feet of land whereas, as Beasley said, his personal examination of the records in the Registry showed that the grantor was John Bellegris and that the parcel conveyed consisted of 120,724 square feet.

Technically, introduction of Beasley's oral testimony as to what he had seen in the records in the Registry violated the "best evidence," or perhaps more accurately the "original document," rule which requires that the contents of a document must be proved by introduction of the document itself. The rule rests upon a policy of precision, it being considered better to present a document to a court rather than to incur the risk of fallibility of human memory or the risk of error in human copying. But oral testimony of the contents of a written document is not inadmissible *per se*, for under a well recognized exception to the rule such testimony is admissible when it is satisfactorily established that the original document is unavailable, as by loss or destruction. Thus Beasley's oral testimony would have been admissible had it been shown that the Registry had burned down and the original deed had been lost.

There was no such showing in the case at Bar. But none was called for by the appellants' general objection nor did that objection alert counsel for the government to the necessity for producing the original deed, or a certified copy thereof, or showing its unavailability, in order to obviate the objection, which we may assume could readily have been done at the trial thereby avoiding another trial to correct the error.

It is true that the generally salutary rule of the common law embodied in Rule 51 of the Federal Rules of Criminal Procedure quoted in material part in the margin [5] that objection to the admissibility of evidence must be accompanied by a reasonably definite statement of grounds in order to inform the court and opposing counsel of the nature of the objection so as to afford an opportunity to remedy the asserted defect may often be honored in the breach, as when the evidence is inadmissible on any ground, when the ground for exclusion is obvious or perhaps when the asserted ground for exclusion could not have been cured. *Noonan* v. *Caledonia Mining Co.*, 121 U.S. 393, 400 (1887). See McCormick, Evidence 118 (1954). However, none of these situations is present here. And had the court and opposing counsel been warned by a statement of the ground for the appellants' objection, the asserted defect could either have been readily cured or counsel for the government could have elected to omit the testimony. Under the circumstances of this case we are not disposed to overlook strict compliance with the clear requirement of the common law and Rule 51, *supra*. The defendants have had the fair trial to which they were entitled. They cannot demand one free of any error whatsoever. See *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953), in which the Court said: "A defendant is entitled to a fair trial but not a perfect one."

What has already been said disposes of several of the defendants' objections to the court's failure to charge in accordance with their requests. Other of their requests

[5] "Rule 51. EXCEPTIONS UNNECESSARY

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court *and the grounds therefor;* . . ." (Italics Added)

were adequately covered in the charge as given. There was no prejudicial error in the charge.

Arguments and contentions of the defendants not covered in this opinion have been considered only to be rejected as not warranting discussion.

Judgments will be entered affirming the judgments of the District Court.

Appendix B

Statutes and Regulations Involved

Statutes

18 U.S.C., Section 371—Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C., Section 3500—Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter

as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine

that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

23 U.S.C., Section 101—Definitions and declaration of policy.

(a) As used in this title, unless the context requires otherwise—

The term "apportionment" in accordance with section 104 of this title includes unexpended apportionments made under prior acts.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the Coast and Geodetic Survey in the Department of Commerce), costs of rights-of-way, and elimination of hazards of railway-grade crossings.

The term "county" includes corresponding units of government under any other name in States which do not have county organizations, and likewise in those States in which the county government does not have jurisdiction over high-

ways it may be construed to mean any local government unit vested with jurisdiction over local highways.

The term "forest road or trail" means a road or trail wholly or partly within or adjacent to and serving the national forests.

The term "forest development roads and trails" means those forest roads or trails of primary importance for the protection, administration, and utilization of the national forests, or where necessary, for the use and development of the resources upon which communities within or adjacent to the national forests are dependent.

The term "forest highway" means a forest road which is of primary importance to the States, counties, or communities within, adjoining, or adjacent to the national forests.

The term "highway" includes roads, streets, and parkways, and also includes rights-of-way, bridges, railroad-highway crossings, tunnels, drainage structures, signs, guardrails, and protective structures, in connection with highways. It further includes that portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State highway department including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

The term "Federal-aid highways" means highways located on one of the Federal-aid systems described in section 103 of this title.

The term "Indian reservation roads and bridges" means roads and bridges that are located within an Indian reservation or that provide access to an Indian reservation or Indian land, and that are jointly designated by the Secretary of the Interior and the Secretary as a part of the Indian Bureau road system.

The term "maintenance" means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for its safe and efficient utilization.

The term "park roads and trails" means those roads or trails, including the necessary bridges, located in national parks or monuments, now or hereafter established, or in other areas administered by the National Park Service of the Department of the Interior (excluding parkways authorized by Acts of Congress) and also including approach roads to national parks or monuments authorized by the Act of January 31, 1931 (46 Stat. 1053), as amended.

The term "parkway" as used in chapter 2 of this title, means a parkway authorized by an Act of Congress on lands to which title is vested in the United States.

The term "project" means an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed.

The term "project agreement" means the formal instrument to be executed by the State highway department and the Secretary as required by the provisions of subsection (a) of section 110 of this title.

The term "public lands highways" means main highways through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations.

The term "rural areas" means all areas of a State not included in urban areas.

The term "Secretary" means Secretary of Commerce.

The term "State" means any one of the fifty States, the District of Columbia, or Puerto Rico.

The term "State funds" includes funds raised under the authority of the State or any political or other subdivision thereof, and made available for expenditure under the direct control of the State highway department.

The term "State highway department" means that de-

partment, commission, board, or official of any State charged by its laws with the responsibility for highway construction.

The term "Federal-aid system" means any one of the Federal-aid highways systems described in section 103 of this title.

The term "Federal-aid primary system" means the Federal-aid highway system described in subsection (b) of section 103 of this title.

The term "Federal-aid secondary system" means the Federal-aid highway system described in subsection (c) of section 103 of this title.

The term "Interstate System" means the National System of Interstate and Defense Highways described in subsection (d) of section 103 of this title.

The term "urban area" means an area including and adjacent to a municipality or other urban place having a population of five thousand or more, as determined by the latest available Federal census, within boundaries to be fixed by a State highway department subject to the approval of the Secretary.

(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System", is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be com-

pleted as nearly as practicable over the period of ... il-a ...ity of the thirteen years' appropriation authorized ...r the purpose of expediting its construction, reconstruc...n, or improvement, inclusive of necessary tunnels and bridges, thro...gh the fiscal year ending June 30, 1969, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce. Added Pub.L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 885, amended Pub.L. 86-70, § 211(e)(1), June 25, 1959, 73 Stat. 146; Pub.L. 86-624, § 17(a), July 12, 1960, 74 Stat. 415.

23 U.S.C., Section 105—Programs.

(a) As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

(b) In approving programs for projects on the Federal-aid secondary system, the Secretary shall require, except in States where all public roads and highways are under the control and supervision of the State highway department, that such project be selected by the State highway depart-

ment and the appropriate local officials in cooperation with each other.

(c) In approving programs for projects on the Federal aid primary system, the Secretary shall give preference to such projects as will expedite the completion of an adequate and connected system of highways interstate in character.

(d) In approving programs for projects under this chapter, the Secretary may give priority of approval to, and expedite the construction of, projects that are recommended as important to the national defense by the Secretary of Defense, or other official authorized by the President to make such recommendation.

(e) Repealed. Pub.L. 86-624, § 17(b), July 12, 1960, 74 Stat. 415. Added Pub.L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 891, amended Pub.L. 86-624, § 17(b), July 12, 1960, 74 Stat. 415.

23 U.S.C., Section 106—Plans, specifications, and estimates.

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution hereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

(b) In addition to the approval required under subsection (a) of this section, proposed specifications for

projects for construction on the Federal-aid secondary system, except in States where all public roads and highways are under the control and supervision of the State highway department, shall be determined by the State highway department and the appropriate local officials in cooperation with each other.

(c) Items included in any such estimate for construction engineering shall not exceed 10 per centum of the total estimated cost of the project, after excluding from such total estimated cost, the estimated costs of rights-of-way, preliminary engineering and construction engineering. Added Pub.L. 85-767, § 1, Aug. 23, 1958, 72 Stat. 892.

23 U.S.C., Section 108—Advance acquisition of rights-of-way.

(a) For the purpose of facilitating the acquisition of rights-of-way on any of the Federal-aid highway systems, including the Interstate System, in the most expeditious and economical manner, and recognizing that the acquisition of rights-of-way requires lengthy planning and negotiations if it is to be done at a reasonable cost, the Secretary, upon the request of the State highway department, is authorized to make available the funds apportioned to any State for expenditure on any of the Federal-aid highway systems, including the Interstate System, for acquisition of rights-of-way, in anticipation of construction and under such rules and regulations as the Secretary may prescribe. The agreement between the Secretary and the State highway department for the reimbursement of the cost of such rights-of-way shall provide for the actual construction of a road on such rights-of-way within a period not exceeding seven years following the fiscal year in which such request is made.

(b) Federal participation in the cost of rights-of-way acquired under this section shall not exceed the Federal pro

rata share applicable to the class of funds from which Federal reimbursement is made. Added Pub.L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 893, amended Pub.L. 86-35, § 1, May 29, 1959, 73 Stat. 62.

23 U.S.C., Section 109—Standards.

(a) The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.

(b) The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State highway departments. Such standards shall be adequate to accommodate the types and volumes of traffic forecast for the year 1975. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System up to such standards. The Secretary shall apply such standards uniformly throughout the States.

(c) Projects on the Federal-aid secondary system in which Federal funds participate shall be constructed according to specifications that will provide all-weather service and permit maintenance at a reasonable cost.

(d) On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be

subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

(f) The Secretary shall not, as a condition precedent to his approval under section 106 of this title, require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, gutters, ditches, and side slopes, and of sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking. Added Pub.L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 894.

23 U.S.C., Section 110—Project agreements.

(a) As soon as practicable after the plans, specifications, and estimates for a specific project have been approved, the Secretary shall enter into a formal project agreement with the State highway department concerning the construction and maintenance of such project. Such project agreement shall make provision for State funds required for the State's pro rata share of the cost of construction of such project and for the maintenance thereof after completion of construction.

Massachusetts General Laws, Chapter 79, Section 12—Measure of damages.

The damages for property taken under this chapter shall be fixed at the value thereof before the taking, and in case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made; and there shall be deducted the benefit accruing to the part not taken unless it was stated in the order of taking that betterments were to be assessed. In determining the damages to a parcel of land injured when no part of it has been taken, regard shall be had only to such injury as is special and peculiar to such parcel, and there shall be deducted the benefit accruing to such parcel, unless it was stated in the order of taking, or if there was no taking in the order for the establishment, construction, alteration, repair or discontinuance of the public improvement which caused the injury, that betterments were to be assessed. Whenever the title or interest taken is such that the property will be exempt from taxation so long as it is held and used for the purposes for which it is taken, the damages for the taking shall include an amount separately determined and stated which shall be estimated to be equal to that portion of the tax assessed upon the property in the year it is taken which, if the tax were apportioned pro rata according to the number of days in such year, would be allocable to the days ensuing after the taking. As amended St. 1953, c. 634, § 1.

Regulations

23 C.F.R. Chapter 1, Section 1.8—*Surveys, plans, specifications, and estimates.*

(a) Surveys, plans, specifications, and estimates for all projects shall be prepared by or under the immediate direction of the State highway department and shall show in

convenient form and detail the work to be performed and the probable cost thereof, all in conformity with the standards governing form and arrangement prescribed by the Administrator.

(b) (1) The State highway department may utilize the services of well-qualified and suitably equipped engineering organizations of counties, municipalities, or other local subdivisions, acting under its direction, for making surveys, preparing plans, specifications, and estimates, and for supervising the construction of any project. Inasmuch as the act requires each State to maintain at its own expense a State highway department having adequate powers and suitably equipped and organized to discharge the duties required, no part of the cost of maintaining the central office of a State highway department or the central office of any publicly maintained engineering organization which may be utilized by the State shall be paid with Federal funds.

(2) The State highway department may utilize the services of the engineering organizations of the affected railroad companies for railway-highway crossing projects subject to the same limitations as to the general overhead costs.

(3) The services of consulting engineers and private engineering organizations may be utilized on a contract basis for design, preparation of plans, specifications, and estimates, and in special cases for constructions engineering other than general supervision, only under one or more of the following circumstances: (i) The work is of unusual character requiring highly specialized knowledge and experience; (ii) it would not be possible to enlarge the staff of personnel available to the State so as to perform the engineering services on the project within a reasonable time; or (iii) the State has a program substantially larger than normal or expected in future years and it desires to employ consulting engineers rather than build up its organization for a comparatively short period.

(c) Until plans, specifications, and estimates for a project or part thereof have been submitted and found satisfactory by the authorized representative of the Administrator, and the State has been so notified, no project or part thereof shall be advertised for contract.

(d) Specifications for individual secondary road projects in those States adopting the 1954 Secondary Road Plan are not subject to approval by the Administrator.

(e) If any part of the cost of a project is to be provided by a county, municipality, or other local subdivision of a State, the State highway department shall determine the official actions to be taken by, and shall enter into such agreements with, the appropriate local officials as the department shall find desirable to safeguard its responsibility under the act for the fulfillment of the project agreement and the continuous maintenance of the project.

23 C.F.R. Chapter 1, Section 1.9—*Project agreement.*

(a) A project agreement between the State highway department and the Administrator shall be executed for each project on a form furnished by the Administrator. No payment on any project shall be made by the United States unless and until such agreement has been executed, nor on account of costs incurred prior to authorization by the authorized representative of the Administrator.

(b) Subsequent to execution of the project agreement no change shall be made which will increase the cost of a project to the Federal Government or alter its termini, type, or other conditions except upon agreement with the Administrator.

(c) Agreements for the construction of projects on the Interstate System shall contain clauses relating to use of and access to rights-of-way required by section 112 of the Federal-Aid Highway Act of 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 411

JAMES S. O'CONNELL and FRANCIS L. HARNEY, JR.
PETITIONERS

v.

UNITED STATES OF AMERICA

No. 412

CHARLES H. LAWTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 507-527; Pet. No. 411, App. 1-21; Pet. No. 412, App. 1-21) is

not yet reported.[1] A prior opinion of the court of appeals is reported at 300 F. 2d 761.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1962 (R. 508, 527). A consolidated petition for rehearing was denied on August 7, 1962 (R. 538). The petitions for writs of certiorari were filed on September 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conspiracy to defraud the United States was charged by an indictment alleging that petitioners conspired to prevent, through trickery and deceit, a fair valuation of land taken by Massachusetts for highway purposes, ninety per cent of whose cost was reimbursable by the federal government under the federal highway program.

2. Whether the evidence was sufficient to support petitioners' convictions.

3. Whether various rulings on the evidence were proper.

4. Whether the existence of adverse publicity deprived petitioners of a fair trial.

STATUTES INVOLVED

The pertinent provisions of 23 U.S.C. 101, 105, 106, and 110 are:

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[1] The record consists of five volumes. Volumes I through III are consecutively paginated and will be referred to as "R."

Sec. 101(a). As used in this title, unless the context requires otherwise—

* * * *

The term "project" means an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed.

The term "project agreement" means the formal instrument to be executed by the State highway department and the Secretary as required by the provisions of subsection (a) of section 110 of this title.

* * * *

(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System", is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the thirteen years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending June 30, 1969, * * * and that the entire System in all

States be brought to simultaneous completion.

* * *

Section 105(a). As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

* * * * *

Section 106(a). Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an opproved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

* * * * *

Section 110(a). As soon as practicable after the plans, specifications, and estimates for a specific project have been approved, the Secre-

tary shall enter into a formal project agreement with the State highway department concerning the construction and maintenance of such project. Such project agreement shall make provision for State funds required for the State's pro rata share of the cost of construction of such project and for the maintenance thereof after completion of construction.

STATEMENT

A one-count indictment returned in the United States District Court for the District of Massachusetts charged petitioners and five others (who were not named as defendants) with having conspired to defraud the United States and the Bureau of Public Roads of the Commerce Department, in violation of the general conspiracy statute, 18 U.S.C. 371 (R. 8-16). Specifically the indictment charged that the conspirators, with knowledge that Massachusetts would apply for federal funds in partial reimbursement of the cost of acquiring land for highway purposes, prevented a fair evaluation of the land and caused Massachusetts to pay to the Damort Land Corporation sums in excess of what the owner would have been willing to accept, diverting to themselves a large portion of the federally reimbursable funds paid by Massachusetts (R. 12-14). After a six-day trial in October and November 1961, petitioners were found guilty as charged (R. 290). Each was sentenced to imprisonment for one year and fined $5,000 (R. 72-77). The convictions were affirmed on appeal (R. 507-527; Pet. No. 411, App. 1-21; Pet. No. 412, App. 1-21).

1. *The Highway Program.*—Federal grants to states for highway construction proceed through four general stages (see 23 U.S.C. 101, *et seq.* and R. 91-94). (1) At the outset, the federal government allocates a general fund for a state, and a State desiring to avail itself of such funds submits for approval a program for a particular type of construction (see 23 U.S.C. 105). (2) After the general project has been approved, more detailed plans are submitted, such as the layout of a right-of-way. When these plans are approved, the federal government reserves the money requested out of the general fund allocated to the State. (3) Thereafter, the State submits to the federal government more exact and detailed plans of the particular construction, such as the exact boundaries of land to be taken for a right-of-way. Upon approval of such plan, the Bureau of Public Roads places the necessary funds in an "obligated" state. Section 106 of Title 23 provides for the approval of the plans "for each proposed project included in an approved program" and further provides that "approval of any such project shall be deemed a contractual obligation of the federal government for the payment of its proportional contribution thereto." (4) No payment by the federal government is actually made until a project agreement has been entered into, as provided in 23 U.S.C. 110 and applicable regulations, covering construction and maintenance and payment of the State's pro rata share.

As to the project here involved, the Bureau of Roads of the Department of Commerce had, prior to

September 1958, approved a request by Massachusetts for the establishment of Interstate Highway Route 95 as part of the interstate roadway system in Massachusetts (stage one) (R. 99).[2] In September 1958, the Massachusetts Department of Public Works submitted to the Bureau of Public Roads eight items of proposed right-of-way acquisition, including a projected right-of-way acquisition of 11.5 miles of land in and about Attleboro, Massachusetts (the "Attleboro right-of-way") (R. 101, 130-131, 291-295). The estimated cost of acquiring the Attleboro right-of-way was $4,000,000 and on approval, this amount was reserved (stage two). In April 1959, after a public hearing, the Department of Public Works submitted for approval to the Bureau of Public Roads detailed plans for the acquisition of the Attleboro right-of-way (R. 103-104, 131, 297). In May 1959, the Bureau of Public Roads approved these plans and "obligated" $2,349,000 of federal funds for that project (stage three) (R. 104, 132, 298).

A "project agreement" (stage 4) had not been executed between the United States and Massachusetts as of the date of the return of the indictment on August 18, 1961 (R. 110-111).

2. *The Fraud.*—From 1959 to 1961, petitioner O'Connell was a practicing lawyer in Boston, Massachusetts. Petitioner Lawton operated a real estate

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[2] Interstate Route 95, which was under construction at the time of trial, is a four-or-six lane highway which runs from the Rhode Island border through Attleboro and the Boston area up to the New Hampshire line at Salisbury (R. 97, 103-104, 297, 440-441).

agency, the C. H. Lawton & Son Company, of Pawtucket, Rhode Island. Petitioner Harney was employed as a right-of-way negotiator for the Massachusetts Department of Public Works. Co-conspirator Walter Webb was the president and sole stockholder of the Damort Land Corporation.

The Damort Land Corporation owned, as its sole asset, a tract of land of about 32,500 square feet in South Attleboro, Massachusetts, on which there was a large frame warehouse, a small frame building, a short railroad spur track, and a chain link fence (R. 133, 159, 171-172, 212, 406-408, 413-414, 429). In late 1957, the land had been rented to a wholesale lumber company, and from late 1957 to about May 1960 to a dairy (R. 133-135, 158, 168-169, 171-172). During this period, Webb had the property listed with the Lawton Company for sale (R. 133-134), but a buyer for the property could not be found. The Lawton Company acted as agent for the property until it was acquired by Massachusetts in 1960 (R. 134-135, 136, 158-159, 160).

In early 1959, William Myette, an employee of the Lawton Company, learned that the Attleboro right-of-way for Route 95 would go through Damort's land. He suggested to Webb that the property be removed from the market inasmuch as the State would be the best buyer (R. 136-137, 172-173). Webb then took the property off the market.

In May 1959, petitioner Harney, who had done preliminary work for the Department of Public Works, told Myette that the State would take Damort's property (R. 137-138, 140-141, 248-249, 370, 443).

At a meeting between Harney and Myette on the property, at which petitioner Lawton was present, Harney said that where the state is about to take land, it was often better if the owner had some representation in Boston (R. 142); that O'Connell was a lawyer who could help in "getting as much money as possible for the land" and had a brother in the Governor's office who could "make the way clear and easy for the sale of the property" (R. 142, 166). Myette relayed the conversations with Harney to Webb, who instructed Myette to contact O'Connell and handle the situation for him (R. 143, 162, 175-176, 201, 205). Harney was present at a meeting in O'Connell's office at which Myette and Lawton spoke to O'Connell about representing Webb (R. 145-146, 162).

At about this time (May or June 1959), Harney telephoned Webb and asked how much money he wanted for the Damort property. When Webb said that he wanted $30,000, Harney asked whether it would be all right to obtain $35,000, to which Webb replied in the affirmative (R. 174, 182). In early July 1959, O'Connell was retained as attorney for the Damort Corporation (R. 118, 176-178, 201-204, 304, 446-447, 455-456). There was no fee arrangement (R. 212).

On August 10, 1959, Massachusetts took 29,500 square feet of Damort's property for the completion of a link in Route 95 by filing an order of taking in the registry of the county (R. 332; see R. 515). In July 1959, on a preliminary appraisal by an employee of the Massachusetts Department of Public

Works, the property was valued at $35,000 (R. 123-124, 305). In November 1959, Errol Hopkins, a right-of-way negotiator for the State, contacted Webb about the property, and Webb referred him to O'Connell. Subsequently Harney told Webb that Hopkins had been "taken care of" (R. 169-170, 178-180, 445, 448-449).

The practice in Massachusetts was to appoint two independent "fee" appraisers if land to be taken was estimated to be worth more than $2500. The appraisals, plus one made within the Department by a negotiator, would then be forwarded to the Real Estate Board of Review which would set a maximum figure for out-of-court settlement (R. 116-117). After two appraisers had been named to evaluate the Damort property, someone in the Department of Public Works substituted the names of Joseph Schwartz and Evert Collins (R. 112-113, 237, 239, 245, 305, 311, 357). In December 1959, Collins and Schwartz appraised the Damort property at $65,000 and $67,000, respectively (R. 126-127, 301, 317, 334, 368, 371-410, 411-421). At about this time, Hopkins, acting as appraiser for the Department of Public Works, appraised the land at $54,000 (R. 124-126, 301, 317, 334, 335-336, 367-368). After an examination of the appraisals, the Departmental Real Estate Review Board sent the Damort land matter back for another appraisal (R. 118). The Department appointed Lawton, who was not on the list of approved independent appraisers maintained by the Department, to appraise the land as an independent "fee" appraiser (R. 114-

115, 118, 127-128, 180-181, 240, 241-243, 319, 320, 453). In February 1960, Lawton appraised the Damort property as of July 28, 1959, at $60,000 and certified under oath that he had no present or prospective interest in the land and never had had such an interest in the property (R. 114-115, 120, 127-128, 150, 301, 317, 320, 334, 422-432, 517).

The Real Estate Review Board subsequently set the maximum figure for out-of-court settlement on the Damort property at $60,000. On March 29, 1960, Webb signed a settlement agreement with the State for $60,212.03, apportioned as follows: Damort Land Corporation, $47,383.37; Rhode Island Hospital Trust Co., mortgagee, $12,269.97; City of Attleboro, for taxes, $558.69 (R. 303, 323, 325, 327, 329, 330, 331-332, 333, 334, 337, 338; see R. 181-182, 218).

On April 4, 1960, Webb met O'Connell and Harney at O'Connell's office (R. 182-183). Webb endorsed to O'Connell the check from Massachusetts to the Damort Corporation of $47,383. When Webb asked "how the price could be arranged at $60,000," and what would happen if somebody asked him any questions about the price, O'Connell said that the land was worth $60,000 and suggested that it would not be wise to indicate that Harney had been seen in O'Connell's office (R. 184-185).

A few days later, O'Connell gave Webb a check for $47,383, the mortgage on the Damort land having been discharged by check from Massachusetts to the mortgagee (R. 187, 325). Shortly thereafter, Webb was billed for and paid $1,500 to the Lawton Company, which represented a five percent "commission"

on $30,000, the price which Webb received for the property (R. 151, 161, 188-189, 232, 355).

In the summer of 1960, Webb was interviewed by F.B.I. agents. Shortly thereafter, Lawton, Myette, and Webb met in Webb's office (R. 152). Lawton, who had brought a file of papers to the meeting, asked Webb if he would permit the removal and destruction of certain papers relating to the valuation of the Damort property and the $1,500 invoice of the Lawton Company (R. 190-191; see R. 153-154). Webb then removed certain papers from his file, tore up those papers, and deposited them in a waste basket (R. 154-156, 190). According to Myette, there was an "impression" that the papers removed from Webb's files would reflect a "different valuation than the one that Mr. Webb was paid under" (R. 156; see R. 191).

ARGUMENT

1. Petitioners attack (Pet. No. 411, 13-18; Pet. No. 412, 10-12) both the indictment and the sufficiency of the evidence on the ground that the federal interest in the highway project was not sufficiently substantial to hold them liable for a conspiracy to defraud the United States. The court below succinctly answered this contention when it stated (R. 512-513):

> [C]heating or overreaching the Commonwealth with respect to the amount it paid for land taken by it for federal highway purposes would in the end expend itself upon the federal government to the extent of 90% under the federal aid road act thereby obstructing one of its lawful func-

tions and if successful subjecting it to pecuniary loss by causing it to pay more than it needed to for the land.

The United States has a vital interest in the federal-aid highway program in the States, a program designed to aid interstate commerce and to augment the nation's defense highway needs. 23 U.S.C. 101 (b), *supra*, pp. 3-4. See H. Rep. 2022, 84th Cong., 2d Sess., pp. 2, 8; S. Rep. 1965, 84th Cong., 2d Sess., pp. 1-2; *United States* v. *Certain Parcels of Land in Knox County, Tennessee*, 175 F. Supp. 418, 421-423 (E.D. Tenn.). The statutory framework of this program and the record as to this project itself both show the federal-state interrelationship (see *supra*, pp. 6-7).

The grant-in-aid program for highways not only involves federal interest, but federal money. Ninety per cent of the cost of the project will be paid by the federal government through grants-in-aid. 23 U.S.C. 120. In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544, this Court noted that government money "is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states," and that grant-in-aid funds "are as much in need of protection from fraudulent claims as any other federal money." The federal government therefore may properly punish conspiracies to defraud which increase

the expenditure of federal grants-in-aid even though they are aimed in the first instance at a State.[3]

Petitioners specifically argue that the United States was not obligated to reimburse Massachusetts for the costs of the highway project until the entire project, including a project agreement, had first been approved by the Bureau of Public Roads, and that such a project agreement had not been executed at the time that the indictment was returned. However, while payment could not be made to the State by the federal agreement until a project agreement had been executed, under 23 U.S.C. 106(a) approval of the specific plans in an approved program (stage three; see *supra*, p. 6) gives rise to a contractual obligation of the United States. Both the definitions of 23 U.S.C. 101 and the administrative practice show that there is no merit in the contention that this obligation cannot arise as to a specific portion of a larger project. "Project" is defined in section 101 to include a particular portion of a highway and "highway" is defined as including "rights of way." Hence, federal approval of the right of way in this case constituted approval of a project within Section 106(a), which obligated the United States.

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[3] *United States* v. *Kaiser*, 179 F. Supp. 545 (S.D. Ill.), relied upon by petitioners, did not involve a grant-in-aid program but merely federal permission to construct a toll bridge over a navigable stream. The federal interest in having the bridge become toll free in the future was held not sufficient to justify prosecution of state employees who were embezzling tolls which belonged to the state.

2. The facts summarized in the Statement refute petitioners' arguments that the evidence is insufficient to support the verdict because the government did not show that the price paid was in excess of the fair market value (Pet. No. 411, 18-19; Pet. No. 412, 12-13) and did not sufficiently show the participation of each individual petitioner in the conspiracy (Pet. No. 411, 26-27; Pet. No. 412, 13-18).

a. As the court of appeals noted, the real question was not the fair value of the land but whether the State and ultimately the United States were tricked. The district court, however, imposed on the government a heavier burden of proof by requiring the jury to find that the price paid was in excess of the market value in order to convict petitioner. Thus, the district judge told the jury that the government's theory was that the defendants conspired "to get more than the land was worth and they ask you to reach the inevitable conclusion that the price was not only in excess of the fair market value of the land, but was procured through the deceit, trickery, and illegal acts of these defendants" (R. 286-287). In determining whether more than fair value was paid, the district court charged the jury that Webb's willingness to sell at $30,000 did not necessarily show the fair market value, but would be some evidence of what Mr. Webb thought it was. Certainly there was no prejudice to petitioners (see Pet. No. 412, 22-23) by the trial court's instruction requiring the jury to find more than was necessary to show a federal crime. The judge's charge clearly instructed the jury that

to find petitioners guilty it must find the fact necessary to support guilt—that petitioners acted with trickery and deceit to interfere with the lawful functions of the United States in the acquisition of land (R. 288-289).

In any event, the jury found that petitioners were guilty and thus, under the court's instructions, necessarily found that the price exceeded fair market value. This finding was amply supported by the gross disparity between the price paid ($60,212) and the price the owner was willing to accept ($30,000) for property which had been on the market for several years, the early appraisal by the Department of Public Works, ($35,000), and the testimony of the government's expert Beasley (discussed *infra*, pp. 18-20).

b. The evidence clearly showed that each of petitioners worked together fraudulently to raise the valuation of Damort's land. As to Harney and O'Connell, the evidence showed that Harney, a state employee, suggested to Myette and Lawton that O'Connell represent the Damort Land Corporation, and Harney was subsequently present at a number of meetings in O'Connell's office; that Harney said in O'Connell's office, when Webb asked how the price could be arranged, that three appraisals had been obtained and that Lawton gave the fourth; that Harney told Webb in O'Connell's presence that Hopkins, the State negotiator, had been "straightened out" and Hopkins subsequently appraised the Damort land at $54,000; that O'Connell suggested to Webb, in the

presence of Harney, that it would not be wise to indicate that Webb had seen Harney in O'Connell's office, and that Webb should say he had met O'Connell prior to the land dealings with the state; and that O'Connell received a $30,000 fee on a $60,000 transaction. In short, there was ample evidence that Harney and O'Connell were not innocent bystanders and were aware of wrongdoing. The jury could reasonably infer that the two men were instrumental in the fraudulent and successful efforts to get favorable appraisals, even though the exact means of doing so were not developed.

As to Lawton, we may assume that he was merely acting in the capacity as a real estate broker for Webb when he arranged for the retainer of O'Connell. But certainly at the time he acted as an appraiser, attesting that he had no interest in the property, and appraised the property at $60,000, he knowingly and actively participated and assisted in the conspiracy. His consciousness of guilt is shown by his deliberate destruction of records relating to the transaction.

3. Petitioners raise various objections to rulings on evidence, none of which present issues warranting review by this Court.

a. The conditional reception of evidence of acts and declarations of co-conspirators.—Petitioner Lawton contends (Pet. No. 412, 19) that some limitations should be placed upon the "device" of introducing evidence of acts and declarations of co-conspirators made in the absence of a defendant. The short answer is that the court was careful to point out to the jury

during the trial that certain evidence of acts and declarations of conspirators made in the absence of one or more petitioners was admissible only against the declarant and the parties present, and that that evidence could not be used against the remaining petitioners until they were shown by independent evidence to have been connected with the conspiracy (R. 138-140, 143, 147, 148, 149, 150, 151, 152, 153, 156, 157, 170, 173, 174, 176, 186). In its instructions to the jury, the court properly charged that once the jury has found that a conspiracy existed, the acts and declarations of co-conspirators were binding upon all members of the conspiracy even if performed in their absence, but that, "before a defendant can be charged with the acts of others, or before he can be found guilty, you must find the fact that he had knowledge that such an agreement existed, that such a plan was in operation" (R. 285-286). These instructions were in accord with the law as laid down by this Court. *Glasser* v. *United States*, 315 U.S. 60, 74; *Lutwak* v. *United States*, 344 U.S. 604, 617.

b. The testimony of Oscar Beasley.—At the trial, the government called one Oscar Beasley, a real estate appraiser from the District of Columbia whose firm had been employed by the Bureau of Public Roads to study real estate values in various states, including Massachusetts. He testified that he had made a study of real estate values in South Attleboro, Massachusetts, during which he examined and surveyed the property of the Damort Land Corporation, and that the Bureau of Public Roads had given him the appraisals of Lawton, Hopkins, Collins, and

Schwartz to examine as to the authenticity of the facts contained in them (R. 254-257, 267). The district court did not allow Beasley to testify as to whether the appraisals followed the rules sent to "fee" appraisers by the Massachusetts Department of Public Works (R. 259) and did not permit him to express his opinion as to whether the sales tested by Schwartz were true comparative values (R. 261). Beasley was allowed to testify that the zoning of the Damort property was industrial whereas the sales listed by Schwartz were of business property; that four sales listed by Schwartz were the same as four of the five sales listed by Collins; and that one such sale appearing in both appraisals indicated that 48,224 square feet of land and improvements had been deeded by the "Whiteman's Diner, Inc." to "Almac's, Inc.," whereas, according to the land registry, the square footage of property conveyed was 120,724 and the grantor was one "John Bellegris" (R. 262-265). The court of appeals ruled that, insofar as Beasley testified to what he had seen in the registry, this violated the best evidence rule. The court of appeals, however, went on to say that petitioners had failed to make proper objection on that ground, and that, if such an objection had been made, this would have alerted the government to produce the original document and obviate the objection. The court's ruling was correct and in any event the error, if there was one, was harmless.

It is evident that the judge's rulings limiting testimony by Beasley made the witness less important to

the government than the prosecutor probably expected him to be, but there is no foundation for the claim (Pet. No. 411, 22-24; Pet. No. 412, 21-22) that the calling of Beasley was intended merely to generate hostility. The trial judge had ruled that he would not take evidence as to what Damort had paid for the land to show that the appraisals were not honest (R. 129, 136). The government through the testimony of Beasley tried to show the dishonesty of the appraisals by indicating that the same errors appeared in two appraisals of the free appraisers. The natural person to call was the man who had studied the problem for the government. Since petitioners still insist that the government had to show, not only that the appraisals were dishonest, that they were wrong—and, as we have seen (pp. 15-16), the district court so instructed the jury—they are in no position to complain that the government should not have shown errors in the appraisals.

c. Testimony concerning the destruction of records —At the trial, the court permitted Myette to testify over objection that, in the summer of 1960, he, Lawton, and Webb met at Webb's office where they discussed a recent interview of Webb with F.B.I. agents, and that, at the meeting, Webb removed from his files and tore up certain papers which "might have something to do with leaving an impression of a false evaluation" (R. 153-156) The court limited the testimony "as of this time" to Lawton (R. 153, 156). Webb testified without objection that Lawton brought his files to the meeting; that Lawton asked Webb whether he would consent to the removal and destruction

of certain papers relating to the valuation of the Damort property and of the $1,500 "commission" invoice; and that Webb subsequently removed from his files and tore up certain papers (R. 190-191). Webb testified at the trial that "it was considered wise to remove from the files this reference to the $30,000 figure that [he] had asked for" (R. 191).

As to petitioner Lawton, who directly participated in the destruction of the records, the evidence was clearly admissible as showing consciousness of guilt. Concerning the other petitioners, the fact of the destruction of the records was admissible as an act relevant to prove that a conspiracy existed. Thus, in *Lutwak* v. *United States*, 344 U.S. 604, 617-618, this Court held that evidence of acts, which occurred after the conspiracy had ended showing that no real marriages had existed was admissible to show that a conspiracy had existed, to obtain illegal entry for aliens as wives of veterans. While the declaration attributed to Lawton by Webb—the request to permit the destruction of the papers—is technically not admissible against the two others since it was a declaration after the conspiracy had ended, the admission of this minor evidence intimately bound up with the admissible testimony as to the act of destruction was harmless.

d. Production of Reports.—On cross-examination, Webb testified that he had been interviewed by F.B.I. agents on two occasions in September 1960 (R. 194-195, 223), and on six or eight occasions between February and August 1961 by investigators of a committee of the House of Representatives (R. 195-197, 223). Pursuant to demands by petitioners for

production of the reports of the interviews, government counsel produced the F.B.I. reports and indicated to the court that there was no "report" of the committee (R. 192, 198). At the bench, government attorneys said that they possessed a three-page unsigned summary by the committee investigators which was "just a compilation of their interview" (R. 199). After examining the document, the court denied production under 18 U.S.C. 3500 and ordered the exhibit marked for indentification and sealed (R. 199-200). Petitioners then requested a *voir dire* examination in order to "bring on whoever made this report * * * to see whether it is admissible," which motion was denied (R. 200).

Contrary to the contention of petitioners O'Connell and Harney (Pet. No. 411, 19-21), the trial court properly denied production of the committee summary and a *voir dire* examination into its compilation since the exhibit and Webb's testimony showed that the exhibit was not, and could not have been, a producible statement under 18 U.S.C. 3500. Section 3500 requires the production of statements made by government witnesses to government agents only if it is a written statement "signed or otherwise adopted or approved" by the witness or is "a substantially verbatim recital of an oral statement * * * recorded contemporaneously with the making of such oral statement." The exhibit was not signed and there was nothing to suggest that it had ever been seen, much less adopted, by the witness. Webb's testimony that at one interview the investigators had made reference to a prior interview with him and that he

thought that he had agreed with what the investigators had "quoted" to him (R. 196) hardly suggests that Webb had seen and adopted any report.[4] There was also no need to hold a hearing to determine whether the report represented a substantially verbatim account of what Webb had said. From the face of the report, the court could determine that the report could not have been a substantially verbatim account. *Palermo* v. *United States*, 360 U.S. 343, 355. The exhibit was apparently a mere three-page summary of six or eight interviews with at least four investigators over a period of about six months. The court of appeals indicated that the summary was drawn from a variety of sources, including Webb, prepared by some unnamed party or parties and "roughly comparable to the statement of facts embodied in [the court's] opinion" (R. 524).[5]

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[4] The pertinent question asked of Webb and his reply was as follows (R. 196): "Q. Well, maybe I misled you with the word 'adopt.' When the Blatnik Committee interviewed you the second time, and they made references to the interview that they had had with you on the first occasion, and as they made quotations to you from what you had said on the first occasion, did you agree that what they quoted to you as your testimony previously was correct as you had given it to them? A. Yes, I think that is so." Webb had not testified, prior to the question, that the investigators had made "quotations" to him.

[5] In addition, it is very doubtful that an investigator of a Congressional committee is an "agent of the Government" within the meaning of 18 U.S.C. 3500. That section was designed to require the prosecution to produce statements made by witnesses to investigators connected with the prosecution or, at the least, the executive branch. It was

4. Before trial, the United States Attorney moved the court for the issuance of a subpoena to the Massachusetts Department of Public Works for the production of certain documents and records, alleging that he believed that certain documents were missing from the State's files and that he "should have the opportunity to know prior to trial what documents called for are missing and unavailable" (R. 29, 30-32). The motion was granted. Shortly thereafter, the State produced the documentary evidence called for in the subpoena (R. 2). Following this action, petitioners moved to dismiss the indictment or, in the alternative, to continue the trial on the ground that an "avalanche of publicity" generated by activities of the State and the United States would operate to deny them a fair trial as guaranteed by the Sixth Amendment (R. 33-54). They alleged that a large amount of publicity resulted from the government's application for the subpoena of records from the state, as well as from the investigative activities of the House committee. After a hearing, the court denied the applications. The court of appeals held that such publicity as there was did not serve to deprive petitioner of a fair trial and that the district court had carefully screened each juror on the *voir dire*.

There is no reason to review the ruling of the court of appeals that denial of petitioners' motion was

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not intended to require an entirely different branch of the government, which has broad, inherent powers to investigate for a completely different purpose, *i.e.*, for purposes of legislation, to reveal documents in its files.

a proper exercise of the district court's discretion. Most of the publicity complained of was not directly related to petitioners; instead, it concerned corruption in general, investigations into the Department of Public Works of Massachusetts, and the investigative activities of the Boston Finance Commission, especially as they related to one John McGrath and his attorney (R. 34, 40, 45, 48, 433-435). While the House Committee was investigating scandals in the administration of the federal-aid highways program, no hearings by that committee had been conducted into suspected scandals in Massachusetts at the time of the trial. It was not until after the trial that the Committee inquired into the administration of the federal-aid highway program in Massachusetts, including the activities of petitioners and their cohorts; and it was chiefly this activity upon which petitioners moved the court of appeals for dismissal of the indictment during the pendency of the appeal because of an alleged inability on the part of the court of appeals to afford them an impartial appeal and consideration of the case (R. 461-502; Exs. 4-70). See 300 F. 2d at 761. While there was some newspaper publicity concerning the motion of the United States Attorney for the issuance of the pretrial subpoena for production of records, this motion was in no way improper. The fact that his conduct in this regard reached the newspapers affords no basis for petitioners "inescapable conclusion" that it was the purpose of the government to try the case in the newspapers and over the radio and television.

The jury was examined on the *voir dire* as to whether they had formed any opinion regarding the guilt or innocence of petitioners, and whether any of them possessed any prejudice for or against the defendants which would keep him from determining the question of guilt or innocence on the evidence (R. 437, 438). No showing was made either at that time or during the trial that any of the jurors was subjected to or affected by any adverse publicity. The court cautioned the jury on two occasions during the trial to refrain from reading any newspaper accounts of the case, or listening to or watching radio, television, or the "public media on the events of this trial" (R. 86, 275). It repeated this admonition in its instructions, and charged the jury that they were to decide the case solely upon the basis of the testimony, exhibits, and the logical inferences which are to be drawn from them (R. 277-278). The jury must be presumed to have followed these instructions. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

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RESPONDENT.

PETITIONERS' REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

C. KEEFE HURLEY
60 State Street
Boston 9, Massachusetts
Attorney for petitioner
James S. O'Connell

EARLE C. COOLEY
60 State Street
Boston 9, Massachusetts
Of Counsel for petitioner
James S. O'Connell

STANLEY H. RUDMAN
11 Beacon Street
Boston 8, Massachusetts
Attorney for petitioner
Francis L. Harney, Jr.

Blanchard Printing Company, Boston, Mass. — Law Printers

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At pages 22 and 23 of the Government's Brief in Opposition, the Government deals with whether the contents of the Blatnik Committee report, marked Exhibit 32 for identification, had ever been adopted by the witness Walter M. Webb. The Government argues that Webb's testimony does not suggest that he had seen and adopted any report. In support of its argument, the Government has printed in footnote 4 on page 23 of its brief a single question and

answer which it maintains is the pertinent testimony in this regard. Petitioners wish to point out that the following questions and answers immediately preceded the question and answer printed in footnote 4 on page 23 of the Government's brief: (R. 196)

> "XQ. And as you talked, did the people who interviewed you make notes of what you were saying? A. Yes, sir.
>
> XQ. And in the second meeting that you had with the Blatnik Committee, sir, were there references to what you had said the first time? A. I would say so.
>
> XQ. And as they referred back to what you had said the first time, [247] did you adopt those statements that you had made as being correct, as they related them to you from the first conversation? A. Say that again."

Respectfully submitted,

C. Keefe Hurley
60 State Street
Boston 9, Massachusetts
Attorney for petitioner
James S. O'Connell

Earle C. Cooley
60 State Street
Boston 9, Massachusetts
Of Counsel for petitioner
James S. O'Connell

Stanley H. Rudman
11 Beacon Street
Boston 8, Massachusetts
Attorney for petitioner
Francis L. Harney, Jr.